Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

October 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	
Background	3
Decision of the Customs Court	5
Decision of the Court of Customs and Patent Appeals	7
REASONS FOR GRANTING THE WRIT	
I. The Court of Customs and Patent Appeals Has Decided A Federal Question In Clear Conflict With An Applicable Decision of This Court, Which In Turn Has Been Ratified By Congress	8
II. The Decision of the Court of Customs and Patent Appeals That Petitioner Was Not Entitled To Summary Judgment Is Based On An Erroneous Legal Analysis	12
III. The Court of Customs and Patent Appeals, In Directing The Entry of Summary Judgment For The Respondent, Has So Far Departed From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise of This Court's Power Of Supervision	18
IV. The Issues Presented Herein Are Of Vital Importance	20
CONCLUSION	22

Page

APPENDIX A—OPINION OF THE UNITED STATES CUSTOMS COURT AND CONCURRING OPINIONS 1a

APPENDIX B—JUDGMENT OF THE UNITED STATES CUSTOMS COURT 53a

APPENDIX C—OPINION OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND DISSENTING OPINION 57a

APPENDIX D—STATUTES INVOLVED 115a

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V 1975) 117a

Section 516(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(d) (Supp. V 1975) ...120a

Section 331(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2049, 2053 (1975) 121a

TABLE OF CITATIONS

CASES:

American Express Co. v. *United States*, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C. P.A. 1973) 10
Downs v. *United States*, 187 U.S. 496 (1903) 4, 6, 7, 8, 9, 10, 11, 12
Downs v. *United States*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 10, 11
F. W. Meyers & Co. v. *United States*, 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903) 9, 11
Hammond Lead Products, Inc. v. *United States*, 306 F. Supp. 460 (Cust. Ct. 1969), *reversed on jurisdictional grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 9
Hurtado v. *United States*, 410 U.S. 578 (1973) 20
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948) 20
Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) ..4, 6, 9, 12, 13
Nicholas & Co. v. *United States*, 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 9, 12

Page

United States v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 5, 9, 17
Wessels & Bro. v. *United States*, 6 Treas. Dec. 319, T.D. 24355 (Bd. Gen. App. 1903) 9, 11

STATUTES

Tariff Act of 1897, 30 Stat. 151
Section 5 3

Tariff Act of 1909, 36 Stat. 11
Section 6 12

Tariff Act of 1913, 38 Stat. 114
Section IV, paragraph E 12

Tariff Act of 1922, 42 Stat. 858
Section 303 12

Tariff Act of 1930, 46 Stat. 590
Section 303 [19 U.S.C. § 1303 (Supp. V 1975)] .2, 4, 5, 6, 12, 13, 14, 17, 18, 19
Section 516(d) [19 U.S.C. § 1516(d) (Supp. V 1975)] 3, 5

Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)
Section 321(f) 5
Section 331(a) 5, 12
Section 331(d) 3, 5

28 U.S.C. § 255 (1970) 6

28 U.S.C. § 1256 (1970) 2

28 U.S.C. § 1582(b) (1970) 5

28 U.S.C. § 2601 (1970) 7

MISCELLANEOUS

41 Fed. Reg. 1298 (1976) 5

H.R. 8304, 81st Cong., 2d Sess. (1950) 13, 14

H.R. 1535, 82d Cong., 1st Sess. (1951) 14

H.R. 5505, 82d Cong., 2d Sess. (1952) 14

BEST COPY AVAILABLE

Page

H.R. 6767, 93d Cong., 1st Sess. (1973) 17

H.R. Rep. No. 93-571, 93d Cong., 1st Sess. (1973) 17

Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. (1968) 15

Hearings on H.R. 5505 Before the Senate Comm. on Finance, 82d Cong., 2d Sess. (1952) 14

Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance, 92d Cong., 1st Sess. (1971) 15, 16, 20

31 Op. Att'y Gen. 545 (1910) 9

S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) ..16, 17, 18

Sturm, *A Manual of Customs Law* (1974) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, Zenith Radio Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals entered in this proceeding on July 28, 1977.

OPINIONS BELOW

The opinion of the United States Customs Court (C.D. 4691) and the concurring opinions are reported at 430 F.Supp. 242, 78 Cust. Ct. ——, and Customs Bulletin and Decisions of May 11, 1977, page 44. These opinions are reproduced in Appendix A to this Petition, pages 1a-50a. The judgment of the Customs Court is reproduced in Appendix B to this Petition, pages 53a-54a.

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1195) and the dissenting opinion are reported at —— F.2d ——, 64 C.C.P.A. ——, and Customs Bulletin and Decisions of August 17, 1977, page 6. These opinions are reproduced in Appendix C to this Petition, pages 57a-112a.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1256 (1970).

QUESTIONS PRESENTED

1. Whether the remission or forgiveness of a tax on products exported to the United States, when like products which are sold or consumed in the country of their production are subject to such tax, constitutes the payment or bestowal, directly or indirectly, of a bounty or grant, for purposes of section 303 of the Tariff Act, as amended (19 U.S.C. § 1303 (Supp. V 1975)).

2. Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303.

STATUTES INVOLVED

Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303 (Supp. V 1975); *see* Appendix D to this Petition for full text, pages 115a-120a):

"§ 1303. Countervailing duties.

"(a) Levy of countervailing duties.

"(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516 (Supp. V 1975); *see* Appendix D to this Petition for text, pages 120a-121a).

Section 331(d) of the Trade Act of 1974 (Pub. L. No. 93-618, 88 Stat. 1978, 2053 (1975); *see* Appendix D to this Petition for text, page 121a).

STATEMENT

Background

The countervailing duty law, which this case involves, has remained unchanged in all material respects since the first countervailing duty statute of general application was enacted in 1897.[1] The law has been twice

[1] Tariff Act of 1897, § 5, 30 Stat. 151, 205.

construed by this Court: in 1903 (*Downs* v. *United States,* 187 U.S. 496) and in 1919 (*Nicholas & Co.* v. *United States,* 249 U.S. 34). In each case, this Court taught, generally, that the scope of the statute was extremely broad and, specifically, that the remission of taxes by foreign countries upon the exportation of articles which are subjected to a tax when sold or consumed in the country of production constituted the conferral of a bounty or grant within the contemplation of the statute.

Against this background, on April 3, 1970, petitioner, a domestic manufacturer of various consumer electronic products, filed with the Commissioner of Customs a petition under section 303 of the Tariff Act of 1930, seeking the assessment of countervailing duties on certain consumer electronic products from Japan since such products (in addition to being bountied by other means) are exempt from a so-called "commodity tax" when exported. R. 11-12, 20, 320, 326-328.[2] The petition was met with inordinate delay by the Treasury Department and, in fact, it was not until Congress "forced" the Department to act that a final determi-

[2] "R." refers to the printed transcript of record in the Court of Customs and Patent Appeals, a copy of which has been filed with the Clerk of this Court.

The essential facts regarding the commodity tax are not in dispute. The relevant Japanese law, the Commodity Tax Law, Law No. 48 of 1962, imposes a single-stage commodity tax upon a manufacturer's shipment of specified electronic (and other) products for consumption in Japan. The same products are exempt from the tax when shipped for export. A tax paid on a shipment for home consumption is refunded if that shipment is later exported. R. 15-17, 21-22.

nation was issued on January 7, 1976.[3] 41 Fed. Reg. 1298 [R. 7]. Treasury then determined that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." *Ibid.* No reason was given why the forgiveness of the commodity tax or exportation did not constitute a bounty or grant within the settled judicial interpretation of the statute.

Decision of the Customs Court

Pursuant to the recently enacted subsecion (d) of section 516 of the Tariff Act of 1930 (19 U.S.C. § 1516 (d) (Supp. V 1975)), petitioner commenced suit in the Customs Court to challenge the negative determination of the Secretary of the Treasury.[4]

[3] On January 3, 1975, Congress enacted the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975). Section 331(a) of the Trade Act amended the countervailing duty statute, by, among other things, requiring the Secretary of the Treasury to make a final determination as to whether or not any bounty or grant is being paid or bestowed within twelve months from the date on which a petition is filed. Section 331(d) of the Trade Act provided, in effect, that, with respect to investigations in progress on the date of enactment of the Trade Act, a final determination would have to be made within twelve months of the day following the date of enactment.

[4] That Court had jurisdiction under 28 U.S.C. § 1582(b) (1970). Section 321(f) of the Trade Act added subsection (d) to section 516 of the Tariff Act of 1930, in direct response to a decision of the Court of Customs and Patent Appeals which had held that the Customs Court did not have jurisdiction over American manufacturers' challenges of negative countervailing duty determinations by the Secretary of the Treasury. *United States* v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971). This is the first case brought under section 516(d) to be decided by the courts.

After issue was joined,[5] each side moved for summary judgment. Petitioner contended that, as a matter of law, the forgiveness of the commodity tax on the exportation from Japan of the subject electronic products constitutes the direct or indirect payment or bestowal of a bounty or grant cognizable under section 303. The respondent, on the other hand, contended that, as a matter of law, the tax forgiveness on exportation does not constitute a bounty or grant. Further, upon application by the respondent, a three-judge panel was convened pursuant to 28 U.S.C. § 255 (1970).[6]

The Customs Court rendered its decision and judgment on April 12, 1977, in favor of petitioner. Relying significantly upon *Downs* and *Nicholas, supra,* the Court (per Richardson, *J.*, Newman, *J.*, and Boe, *J.*) unanimously held that the forgiveness of the Japanese commodity tax on exportation constituted the conferral of a bounty or grant under section 303, as a matter of

[5] In its complaint, petitioner contested the negative countervailing duty determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes. R. 15.

[6] 28 U.S.C. § 255 (1970) provides:

"§ 255. Three-judge trials

"(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

"(b) • • • • •"

law. Each of the three judges wrote a separate opinion.

In its order (judgment), the Customs Court directed the Secretary of the Treasury "to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order." Appendix B, page 53a.

Decision of the Court of Customs and Patent Appeals

On April 15, 1977, the respondent filed a timely appeal with the Court of Customs and Patent Appeals.[7] On July 28, 1977, that Court, in a 3-to-2 decision, reversed the decision and judgment of the three-judge Customs Court. Writing for the majority, Chief Judge Markey stated that the language in *Downs* relied upon by the Customs Court was *dicta* and did not have to be followed, that the Treasury Department had a long-established practice of not countervailing "nonexcessive" tax remissions, that Congress acquiesced in this practice, and that the Secretary of the Treasury had "presumably determined" that the economic result of the tax remission is not a countervailable benefit. The Court directed that summary judgment be entered for the respondent. Judge Miller, writing for himself and Judge Baldwin in dissent, observed that the key lan-

[7] That Court has jurisdiction under 28 U.S.C. § 2601 (1970).

guage of *Downs* was not *dicta* but was basic to this Court's decision, that *Downs* prevails over any administrative practice, that Congressional acquiescence in such practice is a myth, and that the controlling question is a matter of law and not a factual inquiry into economic result.

REASONS FOR GRANTING THE WRIT

I. The Court of Customs and Patent Appeals Has Decided A Federal Question In Clear Conflict With An Applicable Decision Of This Court, Which In Turn Has Been Ratified By Congress.

The *Downs* case, the first of two countervailing duty cases decided by this Court, involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise accompany the sale of surplus. This Court, addressing itself to this scheme, stated (187 U.S. at 515):

> "The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation."

The majority of the Court of Customs and Patent Appeals stated that the foregoing was *dicta* and that this Court really held that the tax remission in conjunction with the other features of the Russian scheme bestowed a bounty.

We submit that the three-judge majority of the Court of Customs and Patent Appeals engaged in an absolutely impermissible reading of this Court's decision, which reading conflicted not only with the plain meaning of what this Court said but with readings given to the *Downs* decision by a veritable host of authorities.[8]

---

[8] General Appraiser Somerville, speaking for the Board of General Appraisers (predecessor to the Customs Court), in *Wessels & Bro.* v. *United States*, 6 Treas. Dec. 319, 320-321, T.D. 24355 (Bd. Gen. App. 1903); General Appraiser Somerville, speaking for the Board of General Appraisers in *F. W. Meyers & Co.* v. *United States*, 6 Treas. Dec. 260, 265, T.D. 24306 (Bd. Gen. App. 1903); Attorney General Wickersham, in 31 Op. Att'y Gen. 545, 556 (1910); General Appraiser Hay, speaking for the Board of General Appraisers in *Nicholas & Co.* v. *United States*, 29 Treas. Dec. 59, 63-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919); Mr. Justice McKenna, speaking for this Court, in *Nicholas & Co.* v. *United States*, 249 U.S. 34, 41 (1919); Assistant Attorney General Hanson in the Government's brief before this Court, in *Nicholas*, *supra*, at 38 (R. 133); Judge Maletz, speaking for himself and Judges Watson and Re (now Chief Judge), of the Customs Court in *Hammond Lead Products, Inc.* v. *United States*, 306 F.Supp. 460 (Cust. Ct. 1969), *reversed on jurisdictional grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971); Judge Almond, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in *United States* v. *Hammond Lead Products, Inc.*, 440

As Judge Miller correctly observed in his dissenting opinion (*see* Appendix C, pages 91a-95a), this Court regarded the remission of excise taxes upon exportation as a bounty or grant and the conferral of certificates to exporters as an *additional* bounty or grant. The Board of General Appraisers, whose opinion had been adopted by the Fourth Circuit, concluded that bounties or grants had been bestowed for two separate reasons: (1) the remission of tax and (2) the issuance of the certificates. *Downs* v. *United States,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). Downs argued that *neither* constituted the conferral of a bounty or grant on exportation;[9] the Government joined issue on both points; and this Court resolved the issues presented to it.[10]

F.2d 1024, 1035 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Richardson, speaking for himself and Judge Landis, of the Customs Court in *American Express Co.* v. *United States,* 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973); Sturm, *A Manual of Customs Law,* 415-417 (1974); Judges Richardson, Newman and Boe of the Customs Court and Judge Miller, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in this case.

[9] Downs had argued that the conferral of certificates operated as a bounty on production rather than on exportation (bounties on production not being covered by the statute at that time). In rejecting *Downs'* position, this Court engaged in a discussion of import tariffs which, by way of contrast, were shown by the Court to be a bounty on production but not on exportation. The three-judge majority of the Court below misconceived the purpose of this Court's discussion of import tariffs. *See* Appendix C, page 65a.

[10] Aside from holding that the tax remission on exports of sugar constituted a bounty under the statute, this Court stated (187 U.S. at 502):

> "A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1895, allowing a bounty upon the production of sugar, and Rev. Stat. §§ 3015-3027 [U.S. Comp. Stat. 1901, pp. 1989-1994], allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant,* 169 U.S. 16, 42 L.ed. 644, 18 Sup. Ct. Rep. 219."

Indeed, in *Wessels, supra,* two months after this Court's *Downs* decision, the Board of General Appraisers rendered a decision in a case presenting the identical issue involved in *Downs.* Speaking for the Board, General Appraiser Somerville, *who had written the Board's opinion in Downs,* described the *Downs* case as follows (6 Treas. Dec. at 320):

> "The question thus presented is identical with that discussed in Downs' case, G.A. 4912 (T.D. 22984), decided April 19, 1901, in which we held as follows: * * * that the Russian Government pays or bestows a bounty or grant upon the exportation of so-called 'free sugar' so as to work a benefit or advantage to the exporter *in two ways* (a), by remitting or refunding the excise tax due upon the sugar, and (b) by issuing to the exporter a certificate of exportation, carrying with it a privilege of exemption from taxation, which certificate is transferable and has a substantial market value." [Italics added.]

General Appraiser Somerville then proceeded to demonstrate his understanding that this Court, in *Downs,* had reached the same conclusions as the Board. *Id.* at 320-321.

After *Downs* (and *Wessels* and *Meyers*), Congress reenacted the countervailing duty statute in 1909 and

1913." In 1919, in this Court's only other countervailing duty decision, *Nicholas, supra,* the *Downs* teaching [12] was reaffirmed, and the statute was again reenacted, with changes not here relevant, in 1922, 1930 and 1975.[13]

In brief, this Court has held that the remission of tax upon exportation is a bounty or grant within the countervailing duty law. By reenactment of the statute after *Downs* (and *Nicholas*), Congress has ratified such interpretation. The majority of the Court below has simply chosen to read out of the body of our law the only decisions of this Court ever rendered on the subject. We respectfully submit that review by this Court is necessary to correct this impermissible exercise in judicial construction.

II. The Decision Of The Court Of Customs And Patent Appeals That Petitioner Was Not Entitled To Summary Judgment Is Based On An Erroneous Legal Analysis.

After having incorrectly dismissed this Court's specific holding regarding tax remissions and after having ignored this Court's teachings regarding the

[11] Tariff Act of 1909, § 6, 36 Stat. 11, 85; Tariff Act of 1913, § IV, paragraph E, 38 Stat. 114, 193.

[12] "[T]he remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is . . . [an example of an indirect bounty]." *Nicholas, supra,* 249 U.S. at 41.

[13] Tariff Act of 1922, § 303, 42 Stat. 858, 935; Tariff Act of 1930, § 303, 46 Stat. 590, 687; Trade Act of 1974, § 331(a), 88 Stat. 1978, 2049 (1975), amending section 303 of the Tariff Act of 1930. [In 1922, the statute's coverage was broadened to include bounties or grants on manufacture or production, and paid or bestowed by private entities.]

meaning and scope of "bounty or grant"," the majority below proceeded to conclude that Congress acquiesced in the Treasury Department's administrative practice of countervailing only "excessive" remissions of tax on export—"*i.e.,* the governmental giving of something above and beyond mere excise tax remission." Appendix C, page 74a. However, any such acquiescence, as the dissent demonstrated, is a myth.

According to the record, the first specific notice to Congress (of the administrative practice) came in 1950 (rather than 1949, as stated by the Court below, Appendix C, page 77a), when the Treasury Department sought specific legislation which would have legitimatized the practice. H.R. 8304, Section 2, 81st Cong., 2d Sess. (1950).[15] The Department informed

[14] For example, in *Nicholas,* this Court stated (249 U.S. at 39): "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

Further, this Court explained that a situation where goods could be sold cheaper in the United States than in the place of their production as a result of an act of Government because their destination was a foreign market was one which the statute intended to cover. *Ibid.*

[15] Section 2 of the bill provided that section 303 of the Tariff Act of 1930 would be amended by the addition of the following language: "• • • The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section."

Congress of the conflict between judicial rulings and the administrative practice. *See* opinion of Judge Newman of the Customs Court, Appendix A, pages 25a-26a. Congress rejected the proposal.[16]

Remarkably, the Court below found that this refusal to amend the law indicated approval of the administrative practice. We respectfully submit that the contrary should have been inferred.

The majority below also looked to events of (February) 1968—testimony before the Senate Finance Committee advising of Treasury's practice to consider section 303 inapplicable to "nonexcessive" remissions of excise taxes—and reasoned that Congress' failure to take legislative action afterwards was further evidence of acquiescence. However, Congress did take action. *See* dissent, Appendix C, pages 105a-106a. Further, in June 1968, the Ways and Means Committee of the House of Representatives received testimony from domestic steel industry spokemen that notwithstanding the Treasury Department's refusal to apply countervailing duties to offset remissions of indirect taxes on exports, in disregard of decisions

[16] H. R. 8304 was replaced by H. R. 1535, 82d Cong., 1st Sess. (1951), which in turn was supplanted by H. R. 5505, 82d Cong., 2d Sess. (1952). At Senate Finance Committee hearings on H. R. 5505, Senator O'Mahoney spoke against the proposal, identifying it as an "attempt by law to reverse the present rule." *Hearings on H. R. 5505 Before the Senate Comm. on Finance,* 82nd Cong., 2d Sess. 266 (1952). He proceeded to say (*ibid.*):

> "I have not had the opportunity to examine all of the cases, but I have been given to understand, and I understand, that the courts have, without variation, held that such an exemption or such a refunding is a bounty or grant. So here we have an explicit request to reverse that rule."

H. R. 5505 was not reported out of the Finance Committee.

of this Court, the countervailing duty law does not have to be amended—just followed. *See Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means,* 90th Cong., 2d Sess. 2211-28, *esp.* 2225-26 (1968).

Indeed, in May 1971, Joseph S. Wright, then Chairman of the Board of the petitioner, made similar remarks before the Subcommittee on International Trade of the Senate Finance Committee.[17] In his written statement submitted on May 17, 1971, petitioner's Mr. Wright advised the Subcommittee of Japanese subsidy practices, of the pendency of petitioner's countervailing duty petition (then over a year old),

[17] The Subcommittee had just been formed. In the Senate Finance Committee's press release of March 31, 1971, announcing the formation of the Subcommittee, the Committee Chairman, Senator Long, stated, "I would hope that the Subcommittee's inquiry will include an examination of nontariff barriers, and other matters, such as . . . [t]he border tax-export rebate system of the EEC, and the reasons why indirect tax rebates on exports are not considered 'bounties or grants' within the meaning of the countervailing duty statute as interpreted by Supreme Court cases." *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 7, 11 (1971). Shortly, thereafter on May 14, 1971, the Committee staff submitted a paper entitled *Foreign Trade—A Survey of Current Issues to be Studied by the Subcommittee on International Trade of the Committee on Finance, United States Senate,* reprinted in *Hearings on World Trade and Investment Issues, supra,* at 887, in which the following was stated (*id.* at 902):

> "The countervailing duty law was written to offset the subsidy effect on such devices as the European rebate of indirect taxes on exports. Yet, the law has not been applied in this area even though couched in mandatory terms. A case has been pending on this issue for over two years before the Treasury Department, which appears unwilling to make a decision. If the laws are not adequate or too harsh they should be changed, rather than left as 'dead letters' on the statute books."

of the Treasury Department's reluctance to be guided by decisions of this Court, and of the consequent need for new legislation, *not amending the substance of the countervailing duty law but providing for time limits and judicial review. Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 109, 110-111. Mr. Wright's remarks were well received by the Subcommittee Chairman, Senator Ribicoff. *Hearings on World Trade and Investment Issues, supra,* at 102. In 1975, when the relevant statutes were amended by the Trade Act of 1974, the very recommendations made by petitioner's Chairman were put into place.[18] For the first time, Congress (1) set a time limit by which the Treasury Department must reach a final determination, so that the Department would be prevented from pursuing its past practice "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974), and (2) provided for judicial review of negative countervailing duty determinations by American manufacturers, in order "to assure effective protection under the countervailing duty laws to American producers." *Id.* at 185.

The Congress in 1975 did not wish to address itself to *specific* subsidy practices, since it hoped that an international agreement could be negotiated on the use of subsidies and the application of countervail-

[18] Inasmuch as footnote 26 of the majority's opinion below suggests otherwise, it is erroneous. Appendix C, page 79a.

ing duties.[19] *See* 19 U.S.C. § 1303(d) (Supp. V 1975); *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973). In order to foster an atmosphere conducive to fruitful negotiations, Congress even gave *limited* discretionary authority [not invoked herein] to the Secretary of the Treasury not to countervail bounties or grants, under certain well-defined circumstances and subject to close Congressional review. 19 U.S.C. § 1303(d)(2) and (3) (Supp. V 1975).[20] However,

[19] The failure to provide specifically for the assessment of countervailing duties to offset "nonexcessive" indirect tax remissions on exports can hardly be deemed acquiescence in the Treasury Department's practice, or a Congressional effort to decide, by implication, the then pending countervailing duty controversy against the interests of American industry. In fact, the key committee of each chamber of Congress, in reporting on certain amendments to the Antidumping Act of 1921, took pains to state that they were expressing neither approval nor disapproval of the Treasury Department's practice under the countervailing duty law of not countervailing remissions of indirect taxes. *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974); *see* discussion in Judge Newman's opinion, Appendix A, pages 27a-29a.

[20] Section 330 of the Executive Branch-sponsored Trade Bill, *H. R. 6767,* 93d Cong., 1st Sess. (1973), gave the Secretary of the Treasury the discretion to refrain from ordering the assessment of countervailing duties if he determined that the imposition of such duties would result or be likely to result in significant detriment to the economic interests of the United States. This proposal was rejected by Congress.

Relying principally on *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971), the Court below misconceived the nature of the Congressional grant of authority to the Secretary of the Treasury under section 303 as being discretionary rather than mandatory. However, as Judge Miller accurately reported in his dissenting opinion, the *Hammond Lead* decision was swiftly and decisively overruled by Congress. *See* Appendix C, pages 107a-111a.

until any international agreement is reached and until the countervailing duty law is further amended, and absent the three specified conditions precedent to the invocation of the discretionary authority in 19 U.S.C. § 1303(d)(2), it was the clear Congressional intention that the countervailing duty law be enforced on the basis of the unambiguous statutory language and the case law construing it, and that American industry be protected from subsidized import competition. *See S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 33-34, 183-188 (1974).

In sum, we submit that the three-judge majority of the Court below reached an erroneous decision on the merits because of its misreading of this Court's decisions, its incorrect inference of Congressional acquiescence in a Treasury Department practice which conflicted with this Court's decisions, and its incorrect attribution to Congress of an intention to confer discretion on the Secretary of the Treasury to define countervailable bounties or grants.

III. The Court of Customs and Patent Appeals, In Directing The Entry Of Summary Judgment For The Respondent, Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The majority of the Court of Customs and Patent Appeals did *not* decide that the forgiveness of an excise or indirect tax on exportation is not a bounty or grant as a matter of law.[21] Rather, it engaged in a

[21] The majority stated: "Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us." Appendix C, page 82a n. 32.

presumption that the Secretary of the Treasury made a determination "that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." Appendix C, page 69a. The majority also stated that "[t]he factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack." *Ibid.* Based on these perceptions, the Court proceeded to find that respondent was entitled to summary judgment.

However, as the dissent lucidly demonstrated, the "factual underpinnings" of the Secretary's negative determination "are not under attack, because there are none to attack," [22] and the majority's presumption

Actually, that question was before the Court since the respondent argued that, as a matter of law, remission of excise tax alone is not a bounty or grant.

[22] In paragraph 19 of its Complaint, petitioner alleged: "The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the conferral of an economic benefit upon the manufacture and exportation of the aforesaid products." R. 17. Respondent denied the allegation. R. 22. Each party argued that its position on this point was correct as a matter of law.

Further, in discussing the Treasury Department's reasons for its negative determination in a similar case (remission of value-added taxes by European countries on steel products), former Assistant Secretary of the Treasury, David R. Macdonald made it clear that the determination was based on the Department's precedent (of not countervailing indirect tax remissions while countervailing direct tax remissions) rather than on economic analysis. Press briefing, October 20, 1975; R. 271, 274-275. In fact, Mr. Macdonald candidly admitted that the economic argument of United States Steel Corporation that there should be no distinction between direct and indirect taxes was "quite persuasive", and that "the distinction between so-called 'direct' taxes and so-called 'indirect' taxes, econom-

is rebutted by the record. Appendix C, page 86a. In fact, Treasury Department (and other Executive Branch) determinations have been made that the remission of indirect taxes on exportation is trade distortive and constitutes an export subsidy. *See, e.g.,* opinion of Judge Newman and authorities cited. Appendix A, pages 31a-34a, 37a. *See also Statement by Representative of United States on Border Taxes Before GATT Working Party, April 30, 1968,* reprinted in *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 1005, 1008, 1010 (1971).

Consequently, summary judgment for respondent could not possibly lie. *See, e.g., Hurtado* v. *United States,* 410 U.S. 578, 587 n. 8 (1973); *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 256 (1948). If the Court believed that additional evidence of the "economic result" of the Japanese tax remission was important, it should have remanded the case to the Customs Court.

IV. The Issues Presented Herein Are Of Vital Importance.

The importance of this case extends far beyond the petitioner and far beyond consumer electronic

---

ically speaking, may well be chimerical." R. 275. He proceeded to discuss "two ancient Supreme Court cases—*Nicholas* and *Downs* . . . in which the Supreme Court stated that the remission of indirect taxes . . . did, indeed, constitute a bounty or grant," and explained:

> "If the same question were raised before the Supreme Court, *today,* it is our opinion—and this is why we decided the case the way we did—that the Supreme Court would decide the other way, in the light of all of the history and the economic changes that have gone on, up to this time, in a long period of, in essence, acquiescence in the Treasury Department's method of handling this." [R. 276; emphasis in original.]

products. As Judge Newman's opinion stated: "We are confronted with an issue of grave import affecting a broad spectrum of this nation's international trade, as well as a substantial segment of the domestic industry in the United States." [23] Appendix A, page 16a.

The decision of the Court below, if permitted to stand, would constitute judicial cooperation in the Executive's refusal to honor the exercise by the Congress of its constitutional power and duty to regulate foreign commerce by commanding the Executive to offset the trade distortive effect of foreign government intervention in exports to the United States. This Court should act to correct this mischief, concerning which Judge Boe eloquently warned:

> "[I]f a decision of a court shall be predicated on the basis of political and economic expedience and, in so doing, shall ignore judicial precepts and the statutory mandates of the Congress, then assuredly, an erosion of the basic constitutional doctrine of the separation of powers results. The judiciary should not nor cannot serve as the *alter ego* of the Executive or the Congress." [Appendix A, page 38a.]

---

[23] *See also* Judge Richardson's observation: "Admittedly, a decision adverse to either party will have certain effects upon domestic industry and labor." Appendix A, page 16a.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025
Attorneys for Petitioner

October 1977

APPENDIX A

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

APPENDIX A

Opinion of the United States Customs Court and Concurring Opinions

(C.D. 4691)

ZENITH RADIO CORPORATION *v.* UNITED STATES

Before RICHARDSON, NEWMAN and BOE, Judges[1]

RICHARDSON, Judge: Plaintiff, a domestic manufacturer of various consumer electronic products,[2] has instituted this action under 19 U.S.C.A., section 1303, for judicial review of the decision of the Secretary of the Treasury, and has moved for summary judgment pursuant to rules 4.12 and 8.2 of the rules of this court; and defendant has cross-moved for summary judgment. Plaintiff contends that the Government of Japan pays or bestows directly or indirectly a bounty or grant upon the exportation from that country of the aforesaid consumer electronic products in the form of the remission of, or exemption from, payment of a consumption tax to which these products would have been subjected had they not been exported. Defendant contends that

---

[1] The three-judge panel in this case was designated by the chief judge upon application of defendant pursuant to section 108 of the Customs Courts Act of 1970 (28 U.S.C.A. 255) and rule 4.13 of this court.

[2] Television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

the Japanese tax remission or exemption does not constitute a bounty or grant within the meaning of section 1303.

The essential facts of the controversy are not in dispute. The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax.[1]

Plaintiff petitioned the Secretary of the Treasury in 1970, alleging that the exemptions from or refund of the so-called "commodity tax" under the aforementioned Japanese Commodity Tax Law when the said electronic products were exported from Japan amounted to the payment or bestowal of bounties or grants directly or indirectly, upon the manufacture, or production in, or exportation from, Japan of said consumer electronic products. The petition asked the Secretary of the Treasury to impose countervailing duties on these imported products in accordance with section 1303. On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of "Certain Consumer Electronic Products From Japan" was published in the Federal Register [41 Fed. Reg. 1298] at the instance of the Acting Commissioner of Customs upon the approval of the Acting Assistant Secretary of the Treasury. This determination stated that "a final determination is

[1] Tax exempt status is also accorded to certain other categories of goods, not here pertinent, which are sold domestically to or for schools, other educational institutions and educational use, academic research organs and academic research use, social welfare institutions and persons engaged in social welfare activities, the National Museum, and other persons specified by government ordinance. (Defendant's cross-motion for summary judgment p. 2.)

hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan."

Plaintiff after giving notice to the Secretary of the Treasury of its intention to contest this determination, which notice was duly published in the Federal Register [41 Fed. Reg. 10235], then instituted this action for a review of this determination in accordance with the provisions of 19 U.S.C.A., section 1516(d), as amended by the Trade Act of 1974. Section 1516(d), as amended, empowers this court to review, at the instance of American manufacturers, producers, or wholesalers, negative countervailing duty determinations made by the Secretary of the Treasury under 19 U.S.C.A., section 1303, relative to the existence of a bounty or grant on merchandise exported to the United States. The motions for summary judgment follow the joining of issue in said action. There is no question here but that the Japanese commodity tax in issue is either remitted when merchandise is exported from Japan if previously paid thereon, or the exported merchandise is not subject to the payment of tax. Plaintiff contends that the forgiveness of the commodity tax on exportation from Japan of the subject electronic products confers a direct or indirect benefit on the exportation of such products. Plaintiff argues:

> . . . The Supreme Court and the special customs tribunals have repeatedly held that the remission of taxes on exportation constitutes the conferral of a bounty or grant within the scope of our countervailing duty law. The legislative history of section 303 of the Tariff Act of 1930, as amended, provides ample support for that position. The forgiveness of the commodity tax on the exportation of the subject electronic products from

Japan is clearly a bounty or grant under section 303, and the Secretary of the Treasury should be required to direct the assessment of countervailing duties to offset the bounty or grant so bestowed. [Brief in support of plaintiff's motion for summary judgment p. 5.]

Defendant contends that the Japanese commodity tax is not a bounty or grant within the meaning of section 1303. Defendant argues among other things:

The historical and legislative background of the countervailing duty statute demonstrates that the countervailing duty provision was intended to cover only the excessive remission of taxes directly related to the imported product. For over 75 years the Treasury Department construed the provision as applying only to such excessive remissions. Since at least 1951, Congress has been well informed of the Treasury's practice and has consistently failed to countermand it even though legislative amendments rendering all tax remissions subject to countervailing duty have been considered. Thus, Congress must be deemed to have approved the administrative interpretation. [Brief in opposition to plaintiff's motion for summary judgment and in support of defendant's cross-motion for summary judgment p. 4.]

Section 1303 reads in relevant part:

(a) Levy of Countervailing Duties.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United

States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

• • • • • • •

The court agrees with the plaintiff in this case, and concludes that as a matter of law the Japanese commodity tax remission or exemption in issue here constitutes a bounty or grant within the meaning of section 1303. As such, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

Section 1303 has its genesis in section 5 of the Tariff Act of 1897 which reads:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or

> grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

In *Downs* v. *United States,* 187 U.S. 496 (1903), the Supreme Court of the United States held that tax remission is a form of indirect bounty within the meaning of section 5 of the 1897 Act. The *Downs* case involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):

> The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation.

The *Downs* case was cited almost immediately by the Board of General Appraisers for the proposition that tax remission upon exportation constitutes the conferral of a

bounty or grant under the 1897 Act. See *F. W. Myers & Co.* v. *United States,* 6 Treas. Dec. 260, 264-265, T.D. 24306 (1903). It was also cited for the same proposition in *Notes on Tariff Revision* (1908), a 953-page document prepared for the use of the Committee on Ways and Means, U.S. House of Representatives, under the direction of the clerk of the committee, when the Congress was considering revision of the 1897 Tariff Act. Thus, on page 834 of the notes under the heading *Countervailing duty,* the following statement, among others, appears:

> In Downs *v.* United States, 187 U.S., 496 (1903), *it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar,* which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, *is equivalent to a bounty,* and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty. [Emphasis added.]

The preface to these notes contains a statement that "That part of the work relating to the interpretation of the law by the courts and by the Board of General Appraisers has been prepared by Thomas J. Doherty, esq., assistant counsel, United States Treasury Department . . . ."

Section 5 of the 1897 Act was reenacted essentially unchanged as section 6 of the 1909 Tariff Act. The words "province or other political subdivision of government" were added, by the 1909 Act, thus broadening the scope of the statute. Hence, reenactment by Congress of the same language in the aftermath of the *Downs* decision and on the representation made to Congress by so eminent an authority on judicial construction as the assistant counsel of the Treasury Department, represents a classical example of congressional ratification of the judicial construction put upon this statutory language. Indeed, this court said as

much in *American Express Company* v. *United States*, 67 Cust. Ct. 141, 150-151, C.D. 4266 (1971), affirmed without reaching this issue, 60 CCPA 86, C.A.D. 1087 (1973), a case involving the construction of section 1303 [prior to amendment by the Trade Act of 1974] as applied to the practice of the Italian Government in its remission of certain internal taxes upon the exportation of transmission tower units to the United States. And inasmuch as this language has been a part of every United States countervailing duty statute dating from 1897, the argument advanced by the Treasury Department that the teaching in *Downs* as to the countervailability of tax remission is *dicta*, is without support.

In this connection, the court notes that defendant advances the argument that Congress did not intend that the scope of section 5 of the 1897 Act should be any different than the predecessor statute was under the 1894 Act when nonexcessive tax remission was expressly excluded from the countervailing duty measure applied to bounty-fed sugar importations (paragraph 182½, Tariff Act of 1894), and that the legislative history indicative of such congressional intent "apparently had not been brought to the attention of the courts in prior cases." [See footnote 12, defendant's brief p. 13.] In other words defendant implies that the courts in *Downs* overlooked congressional limitations on the countervailing duty statute preserved for the 1897 Act from the 1894 Act as manifest in congressional debates.

It is true that the congressional proceedings culminating in section 5 of the 1897 Act were not a part of the record before the courts in *Downs*. Where the language of a statute is clear there is no need to resort to congressional debates to ascertain the intention of Congress. There is no indication that the language in section 5 of the 1897 Act lacked clarity or that it troubled the courts in any way in that case, necessitating resort by the courts to legislative

history. And as for the congressional debates of the measure to which a large portion of defendant's energies have been directed, the Supreme Court had earlier warned against misdirection caused by reliance on remarks made during congressional debates, and as such, the debates would probably not have been considered relevant by the courts in *Downs*, anyway, given the clarity of the language of section 5. In *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318 (1897), the Supreme Court noted:

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union Pacific Railroad Company*, 91 U.S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. . . .

But even if congressional debates could have been considered in *Downs*, they would not have changed the results reached by the courts in that case. Paragraph 182½ of the 1894 Act had expressly excepted nonexcessive tax remissions from the specific countervailing duty applicable to bounty-fed sugar imports while recognizing tax remission

to be a form of indirect bounty.[4] And of course, the term "net bounty" as used in the congressional debates on the measure by the 54th Congress clearly referred to the excess over the actual tax remitted. But the term "net amount of . . . bounty or grant" introduced into section 5 of the 1897 Act by the 55th Congress is another matter. Even in the House version of the countervailing duty measure which was passed and sent to the Senate it is to be seen that the House moved significantly away from the strictures of the countervailing duty provision as passed by the 54th Congress, in proposing alternative measures which, if enacted into law would have given the United States the option of countervailing the full bounty or just the excess bounty above the tax remitted. The House version provided that bounty-fed sugar "shall pay, in addition to the foregoing rates, a duty *equal to such bounty, or so much thereof* as may be in excess of any tax collected by such country upon such article, or upon the beet or cane from which it was produced." (Emphasis added.) 30 Cong. Rec. 316 (1897).

On the floor of the House, Representative Adolph Meyer of Louisiana, the center of the cane sugar growing industry in this country, after referring to testimony given in committee hearings by sugar importers at New York called attention to the full bounty provision in the House Bill H.R. 379 as follows (30 Cong. Rec. 317):

> . . . We suggested, wisely, I think, that instead of one-tenth of a cent duty upon bounty sugar imported into this country, the duty ought to be equal to the bounty.

And later on in the same speech Representative Meyer opted for adoption of the full bounty alternative as follows (30 Cong. Rec. 318):

---

[4] But even this exemption was conditional, and, not allowed where the requisite certificate was not produced. See T.D. 16641 (1895).

> In view of this selfish and dangerous policy of Germany, it seems to me that we cannot well be too careful in our measures of prevention or too energetic in our countervailing duties. Instead of imposing upon the sugars of bounty-paying countries a tax equal to the excess of such bounty over the tax collected by the country of production upon such exported article, or upon the beet and cane from which it is produced, it would, I think, be far safer to put on and tax the full amount of the bounty that may have been given, and leave to the foreign governments the matter of adjusting their own taxation and bounties. We do not say to them, you shall or shall not impose this tax or this bounty, but we do say that when we find your export bounty or other device enables you to come here and undersell our own people, we will meet you at the shore with a countervailing duty about which there shall be no quibbling or mistake. I may add here that the less the adjustment of the proper duty is complicated by needless questions of computation the simpler will be the duties of the customs collector, and the less opportunity afforded for mistakes or misconduct.

The Senate substituted language for the House version which later became section 5 following the House accession to the Senate amendment. And after the Senate version was introduced through the Senate Finance Committee, the term "net bounty" was never used in the debates that followed in reference to the Senate proposal. On the contrary, the full amount of the German bounty (38 cents on refined sugar or 27 cents on raw sugar per hundred weight) was referred to by the senators as the "export bounty." See, e.g., 30 Cong. Rec. 2204 (remarks of Mr. Gray) (1897); 30 Cong. Rec. 2224 (remarks of Messrs. Caffery, Chandler) (1897); 30 Cong. Rec. 2825 (remarks of Messrs. Jones, Aldrich) (1897).

Since it is clear that the Senate debates indicate an intention on the part of that body of Congress to reach the full amount of the bounty paid under the language it proposed, the term "net amount of . . . bounty . . ." was obviously intended to apply to nothing less than the full amount of the benefit foreign exporters derived from their governments. But the Senate didn't stop here. In addition, it introduced the words "grant" and "bestow" for the first time in the countervailing duty measure. The Senate was fully aware of the new German sugar tax law which was enacted in 1896, and of its increased bounties and burdensome consumption tax which it imposed upon the consumption of sugar by the German people—a burden which drew reactions of disapproval and adverse comment by various senators who participated in the debates. The new consumption tax amounted to approximately $2.16 per pound. However, sugar exported under sugar control was expressly exempt from this tax. Consequently, one need not have been a sugar expert to appreciate that exemption from the consumption tax alone (disproportionately higher than the bounties paid) would continue to stimulate exportation of sugar surplus from Germany *even if the bounties were not paid,* and thus continue to imperil the then incipient U.S. cane sugar production, unless checked by a countervailing duty measure.

Hence, it would appear that the new sugar tax levied by Germany against its people when sugar was consumed in Germany but excused when sugar was exported from Germany became the catalyst which triggered the employment of such sweeping language in the Senate countervailing duty proposal. And the words chosen were eminently appropriate to reach such tax abatement. As the Board of General Appraisers aptly pointed out with respect to the word "grant" in *Downs* (4 Treas. Dec. 405, T.D. 22984 (1901) at page 408) "While it involves the idea of a favor or benefit conferred by the Government, sometimes of an exclusive character, it does not necessarily embrace the act

of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of Government." And again, as the Supreme Court said in *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919) at page 39: "If the word 'bounty' has a limited sense the word 'grant' has not. A word of broader significance than 'grant' could not have been used."

There can be no question then, but that the 55th Congress was faced with a different challenge than that which confronted the 54th Congress, and as a consequence, responded to it with equally different legislation. As stated by the former clerk of the House Committee on Ways and Means in *Notes on Tariff Revision, supra* at page 834 with respect to section 5 of the 1897 Act, "This section was a new departure in tariff legislation . . . ."

There are other contentions advanced by the Government in connection with additional legislation enacted by Congress and international commitments of the United States involving policy decisions which do not supersede the acts of Congress. The court finds that the matters dealt with in these contentions do not temper the mandatory character of the countervailing duty statute in issue or illuminate the congressional intent underlying its enactment.

With respect to the Government's contention concerning the United States' commitment under Article VI(4) of Part II of the GATT,[5] it must be pointed out here that this contention has previously been considered and rejected by the courts. In *American Express Company* v. *United States,*

[5] This provision expressly prohibits contracting parties from levying countervailing duties against each other's products to offset export bounties aiding their exportation where the bounties are in the form of tax remissions or tax exemptions; and the Government maintains that such contractual obligation is binding on the United States.

supra at page 152, this court said with respect to this argument:

> . . . GATT is a trade agreement, which if in conflict with a law of Congress [19 U.S.C.A. § 1303], must yield to the latter.

And our appeals court went even further in that case in regard to this argument when it said [60 CCPA at page 97, footnote 14]:

> That holding finds support not only in the reasoning of the Customs Court that a law of Congress prevails over a trade agreement but also in the fact that the United States undertook Part II of the GATT, which includes Article VI(4), "• • • to the fullest extent not inconsistent with existing legislation." *Protocol of Provisional Application of the GATT,* 61 Stat. A2051 (1947).

Thus, it becomes readily apparent that although our countervailing duty statute [section 1303] speaks in more general terms of *bounties* and *grants* whereas the countervailing duty provision contained in Article VI(4) of Part II of the GATT refers specifically to exemption from or refund of taxes, the GATT's inconsistency "with existing legislation," has been determined by the construction put upon the statutory terms "bounty" and "grant" by the Supreme Court of the United States in *Downs* v. *United States, supra,* in holding that tax abatement or remission comes within the meaning of those terms.

The court does find it somewhat incongruous for defendant, while insisting that Congress did not intend that tax remission be countervailed under section 5 of the 1897 Act and that the Supreme Court did not so construe that statute in *Downs,* to assert in its brief (p. 15): "Of course, when the taxes are not directly related to the imported

product . . . their remission constitutes the bestowal of a bounty or grant upon the exportation of the product."

The defendant represents that it has had a long standing administrative interpretation of the countervailing duty statute which permits it to determine when in its judgment a bounty or grant is excessive and thus should be countervailed. This administrative interpretation is in conflict with the decisions of the Supreme Court of the United States construing the countervailing statute, and must yield.

The Secretary of the Treasury, in administering the countervailing duty statute, must discharge his responsibility in accord with the congressional intent in that statute as interpreted by the Supreme Court of the United States.

The language of section 1303 is abundantly clear, having been construed by the courts in decisions which in turn have been approved by Congress. Generally, the scope of the statute has been held by the courts to be extremely broad; specifically, the statute has been held to embrace remissions of indirect taxes on exportation.

> It is a familiar rule that long-established administrative practice is determinative only when the meaning of the statute is doubtful. *Pittsburgh Plate Glass Co.* v. *United States,* 2 Ct. Cust. Appls. 389, T.D. 32162. . . . Therefore, an administrative practice in plain violation of the terms of the statute cannot be urged as determining the construction that should be given to it. [*United States* v. *Jules Raunheim (Inc.) et al.,* 17 CCPA 425, 431 (1930).]

See also: *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U.S. 266, 278 (1933); *Federal Power Commission* v. *Pacific Power & Light Co. et al.,* 307 U.S. 156, 160 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940).

Admittedly a decision adverse to either party will have certain effects upon domestic industry and labor. It has been ruled that this court does not have equity jurisdiction, and it would be inappropriate for the court to go beyond the statute governing the issue before it and attempt to balance the equities between industry and labor. Also, if this court were empowered to wade into the uncertain waters of foreign policy it might yield to the tempting protestations of defense counsel and assume the risk of making a determination in this area, but this is an area reserved to the executive and legislative branches of the Government.

The Japanese commodity tax involves the remission of an indirect tax and, as such, is countervailable under section 1303.

Judgment will be entered in accordance with this opinion.

NEWMAN, Judge, concurring: While I join in the opinion of Judge Richardson, which concludes that the remission of the commodity tax on the exportation of the subject Japanese consumer electronic products[1] constitutes the bestowal of a bounty or grant under our countervailing duty law, I add this concurring opinion to that of Judge Boe to elaborate on my views concerning the pivotal issues raised in the briefs of the parties.

We are confronted with an issue of grave import affecting a broad spectrum of this nation's international trade, as well as a substantial segment of the domestic industry in the United States. According to former Assistant Secretary of the Treasury David R. Macdonald, the remission of indirect (viz., consumption) taxes "is a universal practice,

[1] These products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

and one in which this Country engages, also!"[2] Moreover, Japan is one of the most important trade partners of the United States, and indeed is our second largest market for exports. Hence, it is needless to say that the United States has a vital and continuing interest in a harmonious trade relationship with Japan and its exporting community.

The United States has had a general countervailing duty statute since the Tariff Act of 1897,[3] and importers have always been accorded the right to a judicial review of countervailing duty assessments by the Treasury Department. However, it was not until the amendment of section 516 of the Tariff Act of 1930 by sections 321(f)(1) and 331(b) of the Trade Act of 1974, Public Law 93-618 (1975), that American producers could obtain judicial review of a *negative* countervailing duty determination by the Secretary of the Treasury.[4] This civil action is the first

[2] Press briefing on October 20, 1975 by David R. Macdonald, former Assistant Secretary, Enforcement Operations and Tariff Affairs, on rejections of petitions in steel countervailing duty cases; transcript of proceedings, page 9, annexed to plaintiff's reply brief as an exhibit.

[3] Predecessor countervailing duty provisions in the Tariff Acts of 1890 and 1894 were limited in their application to certain sugar imports.

[4] See *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied* 404 U.S. 1005 (1971), reversing a decision of the Customs Court, First Division, *Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969). The appellate court's decision in *Hammond Lead* was nullified by Congress in the 1974 Trade Act amendment to section 516, Tariff Act of 1930. The report of the Ways and Means Committee explains the purpose of the amendment (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973)):

> Section 331(b) of the bill would amend subsections (a), (b), and (c) of section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), to provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury. The amendment was necessitated by a 1971 decision

presented for decision under the court's expanded jurisdiction under section 516, as amended. In overriding the Secretary's negative determination, and directing the imposition of countervailing duties on the subject Japanese exports, this court is not oblivious to the possible ramifications concerning this country's trade relations with Japan.[5] However, the proper exercise of our judicial function requires that we interpret and apply the law unrestrained by extra-legal considerations more appropriately addressed to legislative policy. Predicated upon the broad, explicit, and mandatory terms of section 303, as amended, the clear intent of Congress and the unequivocal judicial construction of the statute by the Supreme Court, I agree with the conclusion that the commodity tax exemption or rebate on exportation of the involved electronic products from Japan constitutes the payment or bestowal of a bounty or grant subject to countervailing duties.

Legislative History

Defendant heavily relies upon the legislative history of the countervailing duty provisions in the Tariff Acts of 1890, 1894 and 1897, contending such history demonstrates that nonexcessive tax remissions (i.e., refunds or rebates

---

of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017), which held that judicial review of negative countervailing duty determinations was not available to domestic producers. Your committee is concerned that this decision might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law, and believes that the amendment is also warranted, equitably, because American producers have a right to judicial review in the customs courts of other customs determinations involving duty assessments, and importers are entitled to judicial review of the actual assessment of countervailing duties.

[5] In this connection see: Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. of Int'l. L. 82, 147-148 (1969).

not exceeding the taxes paid by the producer to the foreign government) were not within the contemplation of Congress, and thus are excluded from the statute.

In the 1890 and 1894 provisions cited by defendant,[6] countervailing duties were applicable only to importations of certain sugar. The 1894 statute contained a proviso which relieved an importer of the countervailing duty if he produced a certificate from the government of the country of exportation to the effect that no indirect bounty was received upon the sugar "in excess of the tax collected upon the beet or cane from which it was produced", and that no direct bounty had been or was to be paid.

Unlike the countervailing duty provisions in the Tariff Acts of 1890 and 1894 (which were applicable only to sugar), section 5 of the Tariff Act of 1897[7] generalized the countervailing duty concept, and made additional duties applicable to all dutiable importations. Further, there was no exception made in the 1897 statute for nonexcessive tax remissions similar to the proviso included in the 1894 sugar schedule provision. This 1897 generalized countervailing duty law was carried over (with certain amendments not pertinent here) into the subsequent Tariff Acts of 1909, 1913, 1922 and 1930.[8]

Predicated upon congressional debates and various fragments of legislative history, defendant strenuously argues that the 1897 countervailing duty provision, although couched in general terms, was principally intended to compensate for the export bounty system employed by Ger-

---

[6] Schedule E (sugar schedule), paragraph 237, Tariff Act of 1890, 26 Stat. 567, 584; schedule E (sugar schedule), paragraph 182½, Tariff Act of 1894, 28 Stat. 509, 521.

[7] 30 Stat. 151, 205.

[8] Section 6, Tariff Act of 1909, 36 Stat. 11, 85; paragraph E, Tariff Act of 1913, 38 Stat. 114, 193; section 303, Tariff Act of 1922, 42 Stat. 858, 935; section 303, Tariff Act of 1930, 46 Stat. 590, 687.

many in connection with sugar exports; that Congress was aware that the German government did not collect an internal consumption tax on exported sugar, but nevertheless was concerned only with countervailing the so-called "net bounties" paid to German exporters of sugar, viz., bounties paid in excess of the amount which the exporter was required to pay the German government; that the proviso portion of the 1894 countervailing duty statute shows that the 1897 law was designed only to compensate for the German system of providing for a net bounty; and that the 1897 generalized countervailing duty statute was not intended to change this net bounty concept or to impose a countervailing duty due to the failure of Germany to collect an internal consumption tax on exported sugar.

In short, defendant's position is that the legislative history of the 1894 and 1897 countervailing duty provisions shows that an excessive tax remission directly related to the exported product was the type of indirect bounty or grant which was of principal concern to Congress; and that in utilizing the term "net amount" in section 5 of the 1897 Act, Congress intended thereby to express and incorporate the excessive refund concept of the proviso contained in paragraph 182½ of the 1894 statute.

I see nothing in the legislative history relied upon by defendant which is persuasive that by using the term "net amount" in the generalized 1897 countervailing duty provision Congress intended to continue the exception in the proviso of the 1894 law for nonexcessive tax remissions. While the legislative history cited by defendant indicates that sugar bounties paid by Germany were of major concern to Congress when the bill which became the Tariff Act of 1897 was debated, Congress nevertheless generalized the countervailing duty provision so that it was no longer specifically addressed to importations of sugar (or any other product) nor specifically addressed to indirect bounties in the form of excessive tax remissions. Looking at the new

broad and inclusive language of the 1897 statute as a whole, Congress encompassed therein *all* dutiable products,[9] and *any* bounty or grant, direct or indirect, however the same be paid or bestowed, with duties to be assessed *"in all such cases"*. Accordingly, I am not persuaded that by merely inserting the term "net amount" in the 1897 statute Congress intended to resurrect the proviso in the 1894 sugar schedule provision or to exclude indirect bounties in the form of a tax exemption or "nonexcessive" rebate.

JUDICIAL CONSTRUCTION

In *United States* v. *Passavant*, 169 U.S. 16 (1898), the effect of a tax rebate on the dutiable value of certain goods exported from Germany was considered by the Supreme Court. Although countervailing duties were not involved in the case, Chief Justice Fuller's economic analysis of the German tax rebate scheme is illuminating (169 U.S. at 22-23):

> The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax, and that is the price for the merchandise when bought and sold in those markets.
>
> *Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback.*

---

[9] Section 331 of the Trade Act of 1974 made the countervailing duty law applicable, under certain circumstances, to duty-free imports for the first time in the law's history.

And it is found that in respect of these goods when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. *It is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."* [Emphasis added.]

Passavant was cited by the Supreme Court in two landmark decisions construing the scope of the 1897 general countervailing duty statute, which is the progenitor of section 303, as amended: *Downs* v. *United States,* 187 U.S. 496 (1903); and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). These decisions have been discussed in the opinions of my colleagues, and it is unnecessary to further elaborate upon them here. Suffice it to state that the Supreme Court has unequivocally enunciated that the rebate or remission of a tax on exported products where such taxes have been imposed on a domestic sale in the country of exportation constitutes a bounty or grant under the countervailing duty statute.[10] Defendant, on the

[10] The *Downs* and *Nicholas* decisions have been cited and followed by the Customs Court in two countervailing duty cases involving tax remission schemes: *Hammond Lead Products, Inc.* v. *United States, supra,* 63 Cust. Ct. 316, *rev'd on jurisdictional grounds, United States* v. *Hammond Lead Products, Inc., supra,* 58 CCPA 129, *cert. denied* 404 U.S. 1005 (1971); and *American Express Company* v. *United States,* 67 Cust. Ct. 141, C.D. 4266 (1971), *aff'd on other grounds,* 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973).

other hand, is unable to cite any decision which holds that a nonexcessive tax remission upon exportation is not a bounty or grant under the statute.

After the *Downs* decision, the countervailing duty provision was periodically reenacted by Congress, but was never amended to except tax remissions from its ambit. Fundamentally, such repeated reenactments without excepting tax remissions is significantly indicative of a congressional intent to approve the judicial construction of the countervailing duty statute. *United States* v. *D. H. Grant & Co., Inc.,* 47 CCPA 20, C.A.D. 723 (1959); *United States* v. *Loffredo Bros.,* 46 CCPA 63, C.A.D. 697 (1958); *United States* v. *Astra Trading Corp.,* 44 CCPA 8, C.A.D. 627 (1956).

Administrative Practice

Citing a number of published decisions of the Secretary of the Treasury dating back to 1898[11] and other official actions, defendant contends that "the Department of the Treasury has consistently and uniformly interpreted the countervailing duty statute from its inception as not including within the terms 'bounty or grant' a remission or refund of taxes which does not exceed the taxes actually imposed."[12] Further, defendant asserts that Congress has

[11] T.D. 19321, 1 Synopsis of Dec. 696 (1898); T.D. 19729, 2 Synopsis of Dec. 157 (1898); T.D. 20407, 2 Synopsis of Dec. 996 (1898); T.D. 34466, 26 Treas. Dec. 825 (1914); T.D. 42895, 54 Treas. Dec. 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929); T.D. 49355, 73 Treas. Dec. 107 (1938).

Respecting "long-established administrative practice" as it bears on the construction of tariff laws, see Judge Lane's opinion in *Commonwealth Oil Refining Company* v. *United States, United States* v. *Commonwealth Oil Refining Company,* 60 CCPA 162, C.A.D. 1105, 480 F.2d 1352 (1973).

[12] In *Executive Branch GATT Studies,* Senate Committee on Finance, 93d Cong., 2d Sess. (1974), Congress was informed (pages 11-12):

been well informed concerning Treasury's practice since at least 1951, and therefore "must be deemed to have approved the administrative interpretation of the countervailing duty statute".

Plaintiff does not dispute the existence of the administrative practice relied on by defendant, but urges that the administrative interpretation is entitled to no weight in view of *Downs* and *Nicholas*. Plaintiff also denies any congressional approval of the Treasury's practice.

I find defendant's reliance upon its administrative construction and the asserted congressional ratification thereof to be misplaced in the instant case for the following reasons:

Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on goods) to be a "bounty or grant" within the meaning of our countervailing duty statute (Section 303, Tariff Act of 1930; 19 U.S.C.A. 1303). These precedents have been applied as a general rule with regard to all consumption taxes on goods. The precedents are based on the principle that, since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. The theory has been that the application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation of the product, since the United States would not only impose its own indirect taxes, such as Federal and state excise taxes and state and local sales taxes, but would also collect, through the use of the countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.

The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

First, the Treasury's administrative practice has been, and presently is, in direct conflict with the teachings of *Downs* and *Nicholas*. Fundamentally, where decisions of the Supreme Court and an administrative practice are in conflict, it is the decisions rather than the practice which Congress must be presumed to have ratified when reenacting the statute. *Cf. Atalanta Trading Corp.* v. *United States,* 32 Cust. Ct. 19, C.D. 1574, *aff'd* 42 CCPA 90, C.A.D. 577 (1954); *United States* v. *Douglas & Berry,* 6 Ct. Cust. Appls. 100, T.D. 35342 (1915). See also: *United States* v. *Bassichis Co.,* 16 Ct. Cust. Appls. 410, T.D. 43133 (1928) (legislative approval of judicial interpretation and administrative practice distinguished).

Second, when Congress considered the proposed Customs Simplification Acts of 1950 (H.R. 8304, 81st Cong., 2d Sess.) and 1951 (H.R. 1535, 82d Cong., 1st Sess.),[13] the Treasury Department attempted to persuade Congress to amend the countervailing duty law to provide that the exemption or refund of taxes on goods exported to the United States would not be countervailable. The Department's proposed legislation provided as follows:

> SEC. 2
>
> • • • • • • •
>
> (c) • • • The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section.

The purpose of the proposed amendment and Treasury's rationale in seeking an amendment of the countervailing

---

[13] H.R. 1535 was replaced by H.R. 5505, 82d Cong., 1st Sess. (1951).

duty statute were expressed in the Department's analyses, which reported the following (*Analysis of Customs Simplification Act of 1950,* 5; *Analysis of the Customs Simplification Act of 1951,* 5):

> • • • Subsection (c) would also add a provision that countervailing duty shall not be levied because of the ordinary remission or refund of taxes and duties allowed on exportation by most nations, including the United States. Under the existing administrative interpretation of section 303 of the Tariff Act, countervailing duty is not imposed in such situations, but some judicial comments on the statutes do not make it clear that the courts would consider such duty or tax exemptions as outside the scope of the countervailing duty provision. The proposed amendment eliminates the possibility of rulings in conflict with the administrative practice which has been followed for over 50 years.

Congress carefully considered, but rejected the Treasury's proposed amendment, despite the Department's statement that the proposed amendment would conform the countervailing duty statute to the administrative interpretation and practice.[14] It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law.

---

[14] Treasury's proposal to amend the countervailing duty statute to require a finding of injury, so as to conform our statute with the GATT rule on countervailing duties, was similarly rejected.

Third, when Congress was considering what was to become the Trade Act of 1974, Public Law 93-618 (1975), Treasury's practice under section 303 of applying a "directly related" test to tax remissions was brought to Congress' attention. The executive branch proposed an amendment to section 203 of the Antidumping Act of 1921, 19 U.S.C. § 162 (purchase price),[15] and explained its purpose as follows (Committee on Ways and Means, U.S. House of Representatives, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973,* 93d Cong., 1st Sess. 89-90 (1973)):

> The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.
>
> The Treasury Department considers rebates or remissions of taxes not directly related to an exported product or its components as being bounties or grants within the meaning of the countervailing duty law. Under the Antidumping Act, Treasury is required in its calculation of purchase price to add back to the

---

[15] "It should be kept in mind that the Countervailing Duty Law and the Antidumping Statute are opposite sides of the coin. The former deals with subsidized imports entering this country; the latter deals with imports being sold at less than fair value in this country (meaning imports that are sold here at less than they are sold for in the country of export)." King, *Countervailing Duties—An Old Remedy with New Appeal,* 24 Bus. Law. 1179, 1181 (1969).

price at which merchandise is sold to the United States "the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." The "adding back" of such taxes under the Antidumping Act would have the effect of reducing or eliminating any dumping margins that may exist. The language of the Antidumping Act "in respect to the manufacture, production or sale of the merchandise" is somewhat broader than the standard applied to tax rebates under the countervailing duty law (directly related to the exported product or its components) and could result in inconsistency of treatment of tax rebates under the two laws.

Although Congress adopted the proposed amendment to section 203 of the Antidumping Act (see section 321 of the Trade Act of 1974), significantly the House Ways and Means Committee pointed out (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973)):

> • • • The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.

The Senate Finance Committee adopted a similar stance in its report (S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974)):

> • • • The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.

Consequently, the short of the matter is that Congress has not ratified the Treasury's practice under the countervailing duty law.

International Understanding

Pursuant to Article VI(4) of the General Agreement on Tariffs and Trade (GATT), the imposition of countervailing duties is prohibited "by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[18] The effect of Article VI(4) of the GATT is that the rebate or remission of indirect taxes (i.e., consumption taxes) is exempted from countervailing duties, whereas the remission or rebate of direct taxes (i.e., income taxes) is subject to countervailing duties. See: Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 351 (1975); King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 Bus. Law. 1179, 1185-86 (1969).

Defendant urges that "[a] construction of the term 'bounty or grant' so as to exclude the remission of the

---

[18] Also, Ad Article XVI of Annex I, added to the GATT in 1955, further clarifies the rule as follows: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

Japanese commodity tax is consistent with international understandings".

When the United States and other signatories acceded to GATT, they agreed to undertake Part II thereof (which includes Article VI(4)) "• • • to the fullest extent *not inconsistent with existing legislation*". (Emphasis added.) *Protocol of Provisional Application of the GATT*, 61 Stat. A2051 (1947).[17] Unlike the GATT our countervailing duty law contains no exception for exemptions from or rebates of taxes—direct or indirect. Therefore, Article VI(4) of the GATT is inconsistent with the preexisting countervailing duty law, and must yield to the statute. Moreover, GATT could not in any event modify or rescind an existing act of Congress (viz., section 303), as Congress never delegated any authority to the executive branch to amend the countervailing duty law. See *American Express Company* v. *United States*, 67 Cust. Ct. 141, 152, C.D. 4266 (1971), *aff'd* 60 CCPA 86, 97 (footnote 14), C.A.D. 1087, 472 F.2d 1050 (1973).

Additionally, it is noted that economists and legal commentators have increasingly challenged the economic underpinnings for the administrative adherence to the distinction between remissions of direct and indirect taxes. The administrative policy distinguishing between remissions of direct and indirect taxes is explained by defendant in its brief in opposition to plaintiff's motion (pages 41-42):

> The non-countervailing of non-excessive remissions of taxes directly related to the imported product is based on the principle that since exports are not consumed in the country of production, they should not be subject to consumption taxes in the country of production. This leaves the importing country free to

[17] This provision is commonly referred to as the "grandfather clause".

> impose its taxes on the imported merchandise. Otherwise, the same goods would be subject to double taxation on its consumption, first in the manufacturing country, then in the importing country. The different treatment of different types of taxes rests further on the long-standing assumption that certain so-called indirect taxes (those levied directly on the sale of products, such as excise, sales, and turnover taxes and only indirectly on income or profits) are shifted forward to the ultimate consumer, while so-called direct taxes (those levied directly on income or profit rather than on products) are absorbed by the producer, i.e., are shifted backward and do not affect the price of the product sold to the consumer. The general assumption, in international trade treatment, is that the indirect taxes (which affect the sales price) should be levied in the country of sale of the product while the direct taxes (which do not affect the sales price) should be levied in the country where the product is produced. [Footnote omitted.] By the same token, it is the almost universal assumption that the exemption of an article from a general consumption tax in the country of manufacture gives no incentive to the manufacturer to seek the foreign market as opposed to the domestic.

It is emphasized that the foregoing quotation is accepted as an explanation of Treasury's position but not as a justification.

In a paper for the Twenty-First Annual Conference of the Canadian Tax Foundation, Toronto, November 20, 1968, former Assistant Secretary of the Treasury John R. Petty stated:[18]

[18] A copy of this paper was submitted as an exhibit annexed to plaintiff's reply brief.

> Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality. While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports. In brief, the present provisions of GATT divert trade and thereby disadvantage countries such as the United States and Canada which rely primarily on direct taxes. [Footnotes omitted.]

Marks and Malmgren, in their article cited *supra*, commented (7 Law & Pol. Int'l Bus. at 351):

> Under GATT Article VI(4), any rebates, upon exportation, of direct taxes, e.g., income and social security taxes, are impliedly countervailable, while rebates of indirect taxes are not countervailable. The Treasury, in its administrative actions, has followed the GATT rules. The GATT distinction between rebates of direct and indirect taxes was established at a time when most economists made the working assumption that indirect taxes are fully passed on to the consumer, while direct taxes are not. Following this rationale, the GATT, with the concurrence and drafting assistance of the U.S. negotiators, provided for different treatment of rebates of direct, as contrasted with indirect, taxes.
>
> Most economists now appear to be more cautious in accepting this working assumption. There seems little doubt that indirect taxes frequently are not passed fully through to the consumer, while direct taxes often are partially or fully passed on. The incidence of taxation often depends on whether there exists a buyers' or sellers' market, expressed by the relative elasticity of demand or supply of the product under consideration, rather than whether the tax is direct or indirect. No definitive quantitative study has been found describing the extent to which direct and indirect taxes are, or are not, passed through. [Footnotes omitted.]

See also: *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 Law & Pol. Int'l Bus. 237, 246-47 (1974); Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law & Pol. Int'l Bus. 85, 88-98 (1970); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol. Int'l Bus. 17, 50-54 (1969); *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit); King, *Countervailing Duties—An Old Remedy with New Appeal*, *supra*, at 1188-90.

Indeed, the Treasury Department itself has publicly conceded that no distinction should be made between remissions of direct and indirect taxes in enforcement of the countervailing duty law. At a press briefing in connection with the rejection of countervailing duty petitions filed by United States Steel Corporation, former Assistant Secretary of the Treasury Macdonald stated that in determining whether there is a "subsidy" on export due to the remission of the value-added tax "[t]here is a distinction, in this area, that has been adopted and maintained by the Treasury Department, and that is reflected in the GATT —in our General Agreement on Tariff and Trade—between

'direct' taxes and 'indirect' taxes". Continuing, Mr. Macdonald stated:

> The Treasury Department has consistently followed this distinction and has, in the past, countervailed against the remission of *direct* taxes.
>
> Okay. Having made that distinction, I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition filed by U.S. Steel, it was their economic argument that, *in fact, there should be no distinction between direct and indirect taxes.*
>
> We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because *the distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.* [Emphasis added in part.]
>
> Okay. Any questions?
>
> • • • • • • •
>
> MEMBER OF THE PRESS: Is the Treasury now tinkering with changing the direct and indirect [tax distinction], and considering it as one?
>
> SECRETARY MACDONALD: I think it is fair to say that the United States Government is in favor of changing it.[19]

In sum, I have determined that the direct-indirect tax dichotomy (and the discredited underlying tax shifting assumptions) upon which the Treasury's administration of the countervailing duty law has been premised has no economic or legal justification.

[19] Transcript of press briefing, *op. cit.*, at 3-4, 7.

NONEXISTENCE OF GENUINE ISSUE OF FACT CONCERNING ECONOMIC BENEFITS OF TAX REBATING TO JAPANESE EXPORTERS

Finally, defendant contends there is a genuine issue of fact precluding summary judgment concerning certain economic benefits of the tax remission to the Japanese exporters.

Zenith's complaint alleges that the tax exemption and rebate of the commodity tax confer economic benefits on the Japanese exporters of the subject electronic products. Delineating this allegation more specifically in its brief, plaintiff asserts that due to the tax exemption and rebate of the commodity tax, Japanese exporters "have been able to sell in the United States market at a price lower than that at which they can sell in Japan or at a price that would assure a greater profit than could be earned in Japan", and the exporters "have been able to direct their products to new markets".

In its answer, defendant denies that the tax exemption and rebate results in an economic benefit to the Japanese manufacturers, and in its brief argues that "to the extent plaintiff's above-noted contentions have any relevance, plaintiff has failed to produce the necessary proof, not to mention demonstrating the absence of a genuine issue of fact between the parties". Defendant's brief also states that plaintiff's contention "assumes that the taxes which are levied directly on the product are not shifted forward to the ultimate consumer, contrary to the long-standing assumptions". According to defendant, "[p]laintiff's view assumes that the producer absorbes [*sic*] some of the tax when he sells at home. When the tax is remitted, according to the plaintiff, the producer need not absorb a portion of

the tax and due to this fact may reduce his price (or increase his profit) by the amount of the tax absorbed in the home market".

I have concluded that no triable issue of fact exists in this case. Plainly, when exports are relieved of a domestic consumption tax burden which would otherwise be imposed if the goods were sold in the home market, a bounty or grant, as those terms were construed in *Downs* and *Nicholas*, is bestowed on the exporter as a matter of law. Thus, in *Downs*, the Supreme Court stated (187 U.S. at 513):

> • • • But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. • • •

And, in *Nicholas*, the Court commented (249 U.S. at 37):

> Looking only at the [countervailing duty] paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that *the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market.* And thus it would seem, if we regarded the substance of things, that the condition of the application of Paragraph E obtains. [Emphasis added.]

Although the Supreme Court has not had occasion to construe the countervailing duty statute since *Downs* and *Nicholas*, the economic and legal rationale of those cases remain viable today. There can be no question but that the

rebate or remission of a tax on products exported, where such taxes would have been imposed on a domestic sale in the country of exportation, constitutes a subsidy to the exporter, providing him "an inducement to seek the foreign market". *Nicholas, supra.* And it was precisely such a subsidy that Congress intended should be construed as a bounty or grant subject to the imposition of countervailing duties under our statute.

Further, as noted *supra*, the assumption invoked by the Treasury Department that indirect taxes are fully shifted forward to the ultimate consumer has been shown to be arbitrary and unrealistic. Hence, in *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit), it is noted that indirect taxes do not shift fully forward into the price of products (pages 2-3):

> • • • the imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. *The price net of tax therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed commodity.* [Emphasis added in part.]

Conclusion

For the reasons presented herein, I am clear that as a matter of law the remission of the Japanese commodity tax on the subject electronic products constitutes a bounty or

grant under section 303, as amended. Accordingly, I join my distinguished colleagues in granting plaintiff's motion for summary judgment.

Boe, Judge, concurring: I concur in the well-reasoned opinion of Judge Scovel Richardson. In so doing, however, I feel constrained to comment with further particularity on certain contentions of the defendant in support of the negative determination of the Secretary of the Treasury involved in the instant cause of action.

The defendant warns that a determination by this court that the remission of the Japanese commodity tax on the exports in question constitutes a bounty or grant would have a disastrous effect upon the political and economic policies and relationships of this country. In this connection I cannot refrain from observing that the courts are urged with increased frequency to resolve their determinations in the light of prophesied economic or political crises, notwithstanding judicial rationale or statutory construction to the contrary. Indeed, the resolution of any cause of action by a court must necessarily include a consideration of all facts and information which may have an appropriate and relevant bearing on the ultimate determination. However, if a decision of a court shall be predicated on the basis of political and economic expedience and, in so doing, shall ignore judicial precepts and the statutory mandates of the Congress, then assuredly, an erosion of the basic constitutional doctrine of the separation of powers results. The judiciary should not nor cannot serve as the *alter ego* of the Executive or the Congress.

In seeking affirmation by this court of the administrative determination by the Secretary of the Treasury finding that the remission of the Japanese commodity tax on the merchandise in question destined for exportation to the United States does not constitute a bounty or grant, the defendant appears to rest its argument on two principal contentions:

(1) The legislative history relating to the adoption of the Tariff Acts of 1890, 1894 and 1897 evidences an intent on the part of Congress to exclude the remission of an indirect excise tax by a foreign nation upon exports from the provisions of our countervailing duty statute, and

(2) The omission on the part of Congress to enact legislation altering or repudiating the administrative interpretation of our countervailing duty statute constitutes a legislative approval and sanction of the Treasury Department interpretation.

I

I am unable to concur in the contention of the defendant that the legislative history of the congressional action relating to the Tariff Acts of 1890, 1894 and 1897 serves to reflect the intent of Congress to exclude the remission of an indirect excise tax from the classification of a bounty or grant under our present countervailing duty statute. The remarks by members of Congress while in floor debate, referred to in defendant's briefs, give scant legal justification to the administrative interpretation adopted and presently urged by the Treasury Department. The colloquy engaged in by the members of Congress rather would appear to emphasize the dubious familiarity and understanding on their part with respect not only to the provisions of the German Sugar Act in question, but the specific legislation under their immediate consideration. To adopt an interpretation of our countervailing duty statute upon a presumed legislative intent predicated upon the apparent limited and conflicting understanding evidenced by statements then made by some of the members of Congress, indeed, would do violence to the rules of statutory construction.

No more clear, concise or unambiguous definition of the terms "bounty" or "grant," first included in the countervailing duty provisions of the Tariff Act of 1897 and in all

subsequent countervailing duty statutes enacted thereafter, can be given than the meaning expressed by the Court in *Downs* v. *United States,* 187 U.S. 496 (1903) at 515:

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

In like manner, the Court therein has clearly indicated that in construing what may constitute a "bounty" or "grant," no distinction lies between a direct and an indirect tax, nor that a distinction lies between a remission of a tax and a direct payment or subsidy (at 502):

> *A bounty may be direct,* as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015-3027, allowing a drawback upon certain articles exported, are examples; *or indirect, by the remission of taxes* upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant,* 169 U.S. 16. [Emphasis supplied.]

The import of the foregoing quotations cannot be disclaimed by terming the same to be dicta.

The defendant, however, further urges that the term "net amount" of a bounty, as first used in the Tariff Act of 1897 and thereafter in all subsequent countervailing duty statutes, must be construed conceptually and in point of time with the provisions of the prior Tariff Acts of 1890 and 1894. This contention likewise is based principally upon the exchange between the members of the Congress in floor

debates and discussions with respect to the prior Tariff Acts of 1890 and 1894 as well as the Tariff Act of 1897 then under consideration, and the respective relationship of these acts to sugar acts of foreign nations, principally Germany. From this premise the government contends that the term "net amount," *per se,* excludes the remission of a nonexcessive excise tax from the purview of our countervailing duty statute. No explanation or legislative intent other than the hypothesis of the defendant appears to have been offered with respect to the term "net amount," first incorporated as a part of the countervailing duty provision of the Tariff Act of 1897 and included all countervailing duty statutes enacted subsequent thereto.

The intent of the Congress in the use of the term "net amount" may be understood more readily when viewed in light of the economic and legislative history relating to the German sugar industry during the last decade of the nineteenth century. Throughout this period sugar exports increased greatly, occasioned in large measure by the payment of government bounties. Accordingly, complicated mechanisms to control the bounties paid to sugar exporters on the one hand and to alleviate the resulting economic burden thrust upon the domestic consumer were initiated, modified and amended by successive German tax laws.[1]

A reoccurring burden necessarily fell upon the Congress to enact legislation providing for countervailing duties at specific rates to "keep pace" with the rapidly changing German tax laws and procedures and the fluctuating boun-

---

[1] In 1894 and 1895, sugar exports were reported to have constituted 72% of the total German production. In a single year more than $30,000,000 was paid as bounties to sugar exporters from German internal sugar tax revenues totaling more than $40,000,000. German internal revenue taxes were amended or new taxes enacted in 1887, 1892, 1893, and 1896. *Reciprocity,* J. Laurence Laughlin, Ph.D. and H. Parker Willis, Ph.D. (New York: The Baker & Taylor Co., 1903).

ties occasioned thereby. The need for a countervailing duty statute unrestricted by a specific percentage amount and sufficiently elastic in determination to effect the regulation of any exports from any foreign country was clearly evident.

The Tariff Act of 1897 provided the first countervailing duty provisions of general application. This statute is characterized by a language far more broad and inclusive than the language contained in the Tariff Act of 1890 and 1894 in which the countervailing duty provisions were directed solely to sugar exported from countries which continued, in turn, to enact involved and intricate tax mechanisms in connection with their domestic production and consumption of this commodity as contrasted with the exportation thereof. The Act expanded the scope of the Tariff Act of 1894 by specifically deleting the provision of that Act which limited the application of the statute to excessive tax remissions only. As Judge Richardson appropriately noted in *American Express Company* v. *United States,* 67 Cust. Ct. 141, 150-151, C.D. 4266, *aff'd on other grounds,* 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973):

> [W]ith the advent of the decision of the Supreme Court in *Downs*, it is clear that if Congress had wanted to nullify the effect of the decision in that case it could easily have done so through reenactment of a successor provision to section 5 of the 1897 Tariff Act (or amended the statute) that expressly excluded tax remissions from its ambit, akin to its treatment of that subject in paragraph 182½ of the 1894 Tariff Act. The fact that Congress has never done so is, in our opinion, indicative that it approves of the holding in *Downs,* by reason of which, that case represents the law on the subject of tax remissions to date insofar as the question of "bounties" is concerned.

The Congress also chose to include such meaningful terms and phrases in the Tariff Act of 1897 as:

> "pay or bestow," "directly or indirectly," "any bounty or grant," "net amount of such bounty or grant," "however the same be paid or bestowed" and "[t]he net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury * * *."

The inclusion of these terms as well as the significance of their inclusion has been noted by the Supreme Court. In its consideration of the aforequoted language and in answer to the argument of petitioner's counsel therein, which closely parallels the contentions now urged by the defendant in this proceeding, the Court in the case of *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), at 38-39 stated:

> In further support of their distinctions *counsel cite the executive practice of this country, and adduce the decisions of this and other courts to show that such practice is a useful resolvent of the meaning of words and of legislative intention.*
>
> We appreciate the strength of the argument, but the circumstances are but aids to persuasion; they do not compel it. Every new statute is individual and presents its own problem. *That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose.* Whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise," there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one "equal to the net amount of such bounty or grant, however the same be paid or bestowed." The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant"

could not have been used. Like it synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise," a countervailing duty is required by Paragraph E. [Emphasis supplied.]

The absence of a specific reference to the words "net amount" in prior decisions does not justify the application of an esoteric meaning to the term. The word "net" as used therein should be given no other connotation than its ordinary meaning. *American Customs Brokg. Co., Inc., a/c Hamakua Mill Co.* v. *United States,* 58 CCPA 45, 433 F. 2d 1340 (1970). The use of the word "net" permits the application of the statute with equal facility in the determination of the amount of a bounty paid under differing laws of any foreign nation. Thus, in ascertaining the "net amount" of a bounty or grant, the opportunity exists to consider whether a bounty may have been paid either in full or in part or whether the bounty in question may have been offset in full or in part by other charges consistent with the law of the foreign nation from which the exports have been received. In short, the term "net" has been used to afford the Secretary of the Treasury a criterion to determine the appropriate amount of a countervailing duty which may be applied to the respective exports which have been the beneficiary of differing bounties of any foreign nation. Clearly, however, the criterion used to determine the proper amount of a countervailing duty includes both nonexcessive and excessive tax remissions. Accordingly, when it has been determined that a bounty or grant has been paid by a foreign nation upon its exports, the duty and responsibility of the Secretary of the Treasury lies only and solely in the power delegated to him by the Congress to determine the "net amount" thereof.

In light of the foregoing, the construction and interpretation urged by the defendant cannot be accepted by this court.

II

If, as the defendant contends, a long-standing administrative interpretation of the countervailing duty statute should alone dictate the presently accepted legal construction thereof, then, indeed, judicial review becomes a mockery. It is acknowledged that, "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute, *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic Comm.,* 412 U.S. 94, 121 (1973) • • • ." *Youakim et al.* v. *Miller,* 425 U.S. 231, 235-236 (1976). However, it must also be acknowledged that in the construction of a statute an "expressly articulated position" should be adopted at the administrative level. *Investment Co. Institute* v. *Camp,* 401 U.S. 617 (1971). Where it appears that the statutory interpretation by a department or agency is in error, judicial approbation should not be given. In the recent case of *Espinoza* v. *Farah Mfg. Co., Inc.,* 414 U.S. 86, 94-95 (1973), the United States Supreme Court clearly recognized this limitation upon the independent exercise of administrative statutory construction:

> The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, *Griggs* v. *Duke Power Co., supra,* at 434; *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 545 (1971) (Marshall, J., concurring), but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not

> defer to an administrative construction of a statute where there are "compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see also *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

The defendant has urged that ambiguity in the countervailing duty statute justifies the acceptance of the longstanding interpretation applied by the Secretary of the Treasury.[2] A careful examination of the countervailing duty provisions contained in the original Act of 1897 and reenacted in all subsequent countervailing duty statutes neither reflects the ambiguity alleged by the defendant, nor sustains the "reasonability" of the interpretation adhered to by the Secretary of the Treasury. Particularly, is this true in light of the clear construction of the statute and the specific terms "bounty" and "grant" contained therein by the Supreme Court in the cases of *Downs* v.

---

[2] The present interpretation urged by the defendant is contrary to the interpretation offered by the defendant in its briefs to the Supreme Court in the *Downs* and *Nicholas* cases. The position of the government therein is reflected by the following statement:

> Furthermore, if a foreign government should object to our drawbacks or remission of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive legal ground for resisting simply because it was an ordinary tax remission or drawback in our municipal system. • • •
>
> • • • For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty. [Brief for The United States, in The Supreme Court of the United States, October Term 1902, on Writ of Certiorari, *Downs* v. *United States*, No. 318 at 23-24, 25.]

United States, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States, supra.*

What then is the real question before us in this proceeding? To no extent can it be said that the issue is limited to a question involving a recognized right of a governmental department to interpret a statute, the provisions of which it is charged to enforce. Rather, the basic question before us is whether the Secretary of the Treasury shall have the right and be permitted to continue to interpret the provisions of our countervailing duty statute contrary to its explicit and unambiguous language and contrary to the interpretation and construction previously placed thereon by the highest Court of our land. The answer can only be, no.

In the Trade Act of 1974 (19 U.S.C., sec. 2101), under which statute we are guided in this action, Congress has laid to rest with finality any question as to its intent with respect to the construction of the countervailing duty statute. In section 331 thereof, amending sections 303 and 516 of the Tariff Act of 1930 (19 U.S.C., secs. 1303, 1516), substantially the same language contained in prior countervailing duty statutes has again been incorporated. However, it will be noted that in section 303(d), the Congress affirmatively has recognized the very international economic and political problems, which the defendant in this action has directed to the attention of this court. To these problems the Congress has responded. In so doing, the Congress:

> 1. Underscores its desire and objective that the President " • • • seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties." (19 U.S.C., sec. 1303(d)(1).)
>
> 2. In keeping with this objective, the Congress does not require the imposition of the countervailing duty

provisions for a period of four (4) years from the date of the enactment of the Trade Act if:

a. The Secretary of the Treasury determines adequate steps have been taken to reduce substantially or eliminate the adverse effect of a bounty or grant, and that

b. a reasonable prospect exists that successful trade agreements will be entered into reducing or eliminating the trade barriers in question, and

c. imposition of the additional countervailing duty would be likely to seriously jeopardize the completion of such negotiations.[3]

Any decision not to impose the appropriate countervailing duty of the Secretary of the Treasury pursuant to the foregoing delegated authority is required to be reported to the Congress, either body of which may disapprove the decision of the Secretary, thereby restoring the immediate and full application of the countervailing duty provisions.[4]

From the foregoing, it is clear that the Congress has reaffirmed not only to the executive branch of this government, but to all nations, its approval of the judicial construction placed upon the countervailing statutes of the United States. At the same time, however, a procedure is provided to assist in the resolution of international problems relating to bounties, grants and subsidies through negotiation and the establishment of internationally agreed rules.[5]

---

[3] 19 U.S.C., sec. 1303(d)(2)(A)(B)(C).

[4] 19 U.S.C., sec. 1303(e)(1)(2).

[5] The report of the Committee on Ways and Means, House of Representatives, in the consideration of this legislation is illustrative of the realization by the Congress of the need to provide discretionary authority on the part of the Secretary of the Treasury to withhold the application of the countervailing duty provisions if the same may prove counterproductive during the course of negotiations.

The 4-year temporary discretionary authority was accorded because of the very real danger that the mandatory provisions of section 303, combined with the committee's amendment providing for a 12-month time limit for action under this section, could compel the Secretary to take actions which might well frustrate the successful outcome of the forthcoming negotiations. The committee is aware that there are differences of opinion internationally as to what constitute permissible and nonpermissible export assists under international law and practice, and that the negotiation of an agreement on this issue may prove difficult. *The committee has no desire to sanction certain existing export-assist practices conducted by various foreign governments.* It also recognizes that the United States itself may well be conducting programs of export-assists which foreign governments may find inconsistent with international law and policy.

With this background, the Secretary of the Treasury must be temporarily accorded some degree of latitude in administering section 303 until an international agreement is reached regarding the international practices which would be considered permissible and nonpermissible. Otherwise the Secretary of the Treasury may conceivably be constrained to take countervailing action under section 303 against a practice which ultimately may be internationally agreed to be a permissible international export assist. The discretionary authority accorded herein has been restricted to 4 years to facilitate the international negotiations. It has been accorded on the understanding that the U.S. negotiators will report regularly to the Congress on the progress and ultimately on the outcome of the negotiations with respect to international export assists. *The committee assumes that it may be necessary to further amend section 303 depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States.* [Emphasis supplied.] [H.R. 10710, House Committee on Ways and Means, House Report No. 93-571, 93d Cong., 1st Sess., October 10, 1973, at 75-76.]

Many of the issues and the facts relating thereto which have been presented to this court were likewise presented

to the Congress at the time of its consideration of the Trade Act of 1974. Had the Congress intended to exclude the remission and/or exemption of a nonexcessive excise tax from the classification of a bounty or grant, it could and would have done so. It has chosen not to so do, but rather to open the door to discussion and negotiation among the nations. To construe our recently enacted countervailing duty statute in conformity with the interpretation urged by the defendant not only would disregard the statutory intent of the Congress, but would thwart the very objective it seeks to attain through negotiation and agreement.

It having been determined in the proceeding that the remission of the Japanese commodity tax upon the electronic products which are the subject of this action constitutes a bounty or grant under our present countervailing duty statute (19 U.S.C., sec. 1303), the instant action, accordingly, should be remanded to the Secretary of the Treasury to determine and assess an additional duty equal to the net amount of the bounty or grant bestowed upon such products exported from Japan and entered into the United States from and after the entry of judgment herein.

APPENDIX B

APPENDIX B

Judgment of the United States Customs Court

ORDER

Upon reading and filing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and upon all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's motion for summary judgment be, and the same is granted, and it is further

ORDERED that defendant's cross-motion for summary judgment be, and the same is, denied.

ADJUDGED AND DECREED that the exemption, under the Commodity Tax Law of Japan, of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products") from a commodity tax, when exported from Japan, or the refund of such tax on the exportation from Japan of the subject electronic products, constitutes the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303); and

The Secretary of the Treasury is hereby directed to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or with-

drawn from warehouse for consumption on or after the day following the date of entry of this Order.

SCOVIL RICHARDSON
J.
BERNARD NEWMAN
J.
NILS A. BOE
J.

Dated: New York, New York
April 12, 1977.

APPENDIX C

APPENDIX C

Opinion of the United States Court of Customs and Patent Appeals and Dissenting Opinion

(C.A.D. 1195)

THE UNITED STATES v. ZENITH RADIO CORPORATION, No. 77-19

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

MARKEY, Chief Judge.

Appeal by the United States from a judgment of the United States Customs Court, 78 Cust. Ct.—, C.D. 4691, 430 F. Supp. 242 (1977), holding that remission of a Japanese commodity tax, on electronic products exported from Japan, constitutes a bounty or grant under § 303, Tariff Act of 1930, as amended, 19 USC 1303 (Supp. V 1975), and granting summary judgment to Zenith Radio Corporation (Zenith). We reverse.

Background

In 1970, Zenith petitioned the Commissioner of Customs,[1] alleging that bounties or grants were being bestowed upon the manufacture and export of certain products[2] from

---

[1] Although § 303 imposes the burden of making countervailing duty determinations upon the Secretary of the Treasury, regulations (19 CFR § 16.24(b) (1970), now 19 CFR § 159.47(b) (1976)), require communication with the Commissioner of Customs.

[2] The products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio/tape recorder combinations, tape players, record players and phonographs complete with amplifiers and speakers, tape recorders, and parts of television receivers: color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits. 37 Fed. Reg. 10,087 (1972), as amended 37 Fed. Reg. 11,487 (1972).

Japan. The Commissioner investigated and, on January 7, 1976, published a "Final Negative Countervailing Duty Determination," announcing that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303." 41 Fed. Reg. 1298 (1976). Zenith, pursuant to § 516(d), 19 USC 1516(d) (Supp. V 1975), contested the determination in the United States Customs Court.

The Japanese Tax

The Japanese Commodity Tax Law, Law No. 48 of 1962, as revised and insofar as it appears in the record, imposes a single-stage "commodity tax" upon a manufacturer's shipment of specified electronic products for consumption in Japan. The same products are exempt from the tax when shipped for export.[3] A tax paid on a shipment for home consumption is refunded if that shipment is later exported.[4] It is undisputed that the tax is internal, and that the application of the tax to internal shipments, while refusing to apply it to exports,[5] is the sole governmental action which was adjudged below to have created a countervailable bounty or grant.

The Customs Court

Upon application by the United States, a three-judge panel was convened pursuant to § 108, Customs Court Act

[3] Tax exemption is also accorded certain goods sold at home to educational and welfare institutions, the National Museum, and other specified purchasers.

[4] We employ "remission" to denote both tax exemption and tax refund, which are legally indistinct on this appeal.

[5] A tax on American exports would be unconstitutional. U.S. Const. art. 1, § 9, cl. 5. *Fairbank* v. *United States,* 181 U.S. 283 (1901). Amicus cites the remission of state taxes upon shipments into other states of the United States. Neither consideration is applicable to a determination under § 303.

of 1970. 28 USC 255 (1970). Both parties moved for summary judgment. Relying heavily upon *Downs* v. *United States,* 187 U.S. 496 (1903), the court held that remission of the Japanese Commodity Tax constituted a bounty or grant under § 303, as a matter of law.[6]

Accordingly, the court granted Zenith's motion for summary judgment and ordered the Secretary of the Treasury to determine the net amounts of the bounties or grants and to assess countervailing duties equalling those amounts "on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order."

The Issue

The dispositive issue is whether the mere remission of an excise[7] tax must, as a matter of law, be deemed a bounty or grant under 19 USC 1303 (Supp. V 1975):[8]

§ 1303. Countervailing duties.

(a) Levy of countervailing duties.

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty

[6] Judge Richardson wrote for the court. Judges Newman and Boe filed concurring opinions. The thorough treatment given the issues by the distinguished judges of the panel rests essentially upon an interpretation of *Downs* with which we differ.

[7] The parties have described the tax as a "commodity," "consumption," and "excise" tax. For clarity, we employ "excise" throughout.

[8] The United States contends on appeal that under § 516(g), 19 USC 1516(g) (Supp. V 1975), the Customs Court exceeded its subject matter jurisdiction in ordering duties imposed prior to publication of the decision in the Customs Bulletin. We do not reach that issue.

or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by re-manufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

OPINION

Prior Cases

The rationale supporting the judgment below begins with the view that the applicable law is to be found in a paragraph from the 1903 Supreme Court opinion in *Downs*, supra.[9] Though the Customs Court remarked the presence of an elaborate certificates-plus-tax remission scheme, it found primary support for its judgment in this paragraph (from which the court quoted the first and last sentences) in the lengthy *Downs* opinion:

> The details of this elaborate procedure for the production, sale, taxation and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. The mere imposition of an import duty of three rubles per pood, paid upon foreign sugar, is, like all protective duties, a bounty, but is a bounty upon production and not upon exportation. When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation. [187 U.S. at 515.]

[9] Post *Downs*, the world has seen two World Wars, an industrial revolution, a scientific revolution, and flight from Kitty Hawk to the moon. Customs duties, though large, are not our sole source of government funds, as they virtually were prior to 1916. If, nonetheless, the Supreme Court had established the law in 1903, mere passage of years could not effect our decision, the duty of revising laws to fit a new world having been constitutionally assigned to the Congress.

Opinions must be read in their entireties and in the light of the facts of the case. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944). Though the first and last sentences of the quoted paragraph, considered in vacuo, would support the judgment below, their effect as binding precedent depends upon their relationship to the underlying facts and the remainder of the opinion in *Downs*. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821).

The clearest complete explanation of the complex Russian sugar scheme in *Downs* appears in the Board of General Appraisers' opinion, *Downs* v. *United States*, 4 Treas. Dec. 405, 409-413, T.D. 22984 (1901). The excise tax and certificate elements of the scheme were there described as:

> VI. That, upon the exportation of said sugar * * *, the Russian Government, * * * released said sugar from said tax of 1.75 rubles * * * by a refund * * * a cancellation of indebtedness, or otherwise.
>
> VII. That, in addition to remitting said excise tax, the Government issued to the exporter a certificate certifying that he had exported * * * free sugar. That

• • • such certificates • • • have a substantial market value • • •.

VIII: That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve or free surplus" to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject). [4 Treas. Dec. at 411.]

The board recognized that the combination of (1) regular and additional tax rebates, and (2) export certificates, operated to confer a bounty on sugar exports:

> It is manifest • • • that the exporter • • • receives a valuable bonus • • • and that this bonus accrues • • • upon the exportation • • •. The export certificates or vouchers • • • are only the legal evidence of this valuable privilege or grant conferred by the Government, without whose authority such transfers of sugar would be valueless and of no effect.
>
> Our conclusion, therefore, is that a bounty or grant • • • has been paid or bestowed • • • so as to work a benefit or advantage • • • as follows:
>
> First. • • • the Government remitted or refunded the excise tax • • • or otherwise canceled the indebtness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate • • • had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward. [*Id.* at 413.]

The whole Russian scheme, involving import duties, remission of regular and additional excise taxes, export certificates, and sugar transfers, was before the board, which did not decide the matter piecemeal. Hence, the appellate courts were faced with a board decision resting not on either of two independent grounds, but on a single ground having at least two important elements, and there was no call in *Downs* for the board, the Fourth Circuit, or the Supreme Court to decide whether a non-excessive remission of an excise tax constitutes a *per se* bounty or grant.

On appeal, the Fourth Circuit affirmed, *Downs* v. *United States,* 113 F. 144 (4th Cir. 1902), adopting the board opinion and focusing its own attention on the export certificates:

> We reach the conclusion that the collector of the port of Baltimore, under the provisions of the fifth section of the tariff act of July 25, 1897, properly imposed the duty now complained of by the appellant. We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 Kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the congress of the United States intended to protect the manufacturers of this country, by authorizing the secretary of the treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant. [*Id.* at 145.]

After devoting over ten pages to the elaborate Russian scheme in *Downs,* the Supreme Court referred to the petitioner's position, 187 U.S. at 512:

> It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production.

The remainder of the paragraph initiated by that sentence explains at length how bounties upon exportation may operate as bounties upon production and vice-versa.[10] The Court then responded to Downs' argument that a Russian exporter received the same amount whether or not he exported:

> But the fact that he receives the same amount, whether the goods are exported or sold at home, is not the proper test whether a bounty is paid upon exportation. If no bounty at all were paid all sugar, or at least all "free sugar," would pay the same tax, whether sold at home or exported abroad; and in this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit. The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market. All manufacturers would prefer to sell at a profit in a foreign market. All manufacturers would prefer to sell at home if they could realize a greater price than by selling abroad, but if by being paid a drawback, or by a remission of taxes, they can find a profitable market in a foreign country, so much sugar

[10] The Tariff Act of 1922, ch. 356, § 303, 42 Stat. 935, broadened the countervailing duty law to include bounties or grants paid on manufacture and production.

> as is not needed at home will be sent abroad. [187 U.S. at 514-515.]

Earlier in its extended opinion, the Court discussed the conjunctive effect of the import tariff and excise tax exemption parts of the scheme:

> If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that* these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation. [Emphasis added. 187 U.S. at 513.]

In the middle sentence of the paragraph containing the sentences quoted by the Customs Court, the Supreme Court reiterated its view that an import duty is a bounty upon production. Not without some confusion, the court thus bracketed its reference to import duty with comments that sugar sold in Russia was taxed and that exported was not and that a tax on "all sugar produced," but remitted on sugar exported, constituted a bounty upon exportation. The entire paragraph must be read as a whole, including its reference to import duty, and in the context of the entire opinion, including the Court's earlier discussion of import duty, wherein it had found a bounty in the combination of import duty and excise tax remission. We cannot read the sentences quoted above as though they were divorced from all preceding and succeeding discussion, or as establishing a proposition of law to govern a fact (tax remission alone) not before the Court.

The Supreme Court not only considered the Russian scheme as a whole, but listed the actual price differences it created. The Court ended its opinion with the statement (re certificates) of the Fourth Circuit quoted above and stated, "We all concur with this expression of opinion." 187 U.S. at 516. Thus the Court's *decision* was that the scheme bestowed a bounty. The Court did elect to insert in its *opinion* the broad language of the two sentences which served as foundation stones for the judgment now under review. That broad language was not necessary to the Supreme Court's decision and was not, therefore, its ratio decidendi.[11] When it is read, as it must be read, in light of the facts before the Court, that broad language did not constitute a Supreme Court holding that every nonexcessive remission of every excise tax constitutes a bounty or grant as a matter of law.

We are mindful, as was the Customs Court, of subsequent references to broad statements in *Downs*. See e.g., *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919); *American Express Co.* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd on other ground*, 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973); *F. W. Meyers & Co.* v. *United States*, 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903). Those references cannot, however, require

[11] The language has been described as dicta by some commentators, e.g., Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. Int'l L. 82 (1968-69); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol. Int'l Bus. 17 (1969); Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 Law & Pol. Int'l Bus. 237 (1974), and by this court, in referring to the Customs Court's reliance on *Downs* and *Nicholas*, infra, in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, 137, C.A.D. 1017, 440 F. 2d 1024, 1030 (1971), *cert. denied*, 404 U.S. 1005 (1971).

us to disregard the facts in *Downs*, *Nicholas*, *American Express*, and *Meyers*.[12]

The Supreme Court has instructed us, *Kastigar* v. *United States*, 406 U.S. 441, 454-55 (1972), that broad language unnecessary to the Court's decision in an 80-year-old case is not to be blindly accepted as binding authority, despite its having been quoted in many subsequent cases and even though the language had been described as stating the "principle" of the old case.

There being no prior instance in which any court has been presented with the question of whether, as a matter of law, the remission of an excise tax, without more,

[12] A review of the cited and researched cases establishes, as in *Downs*, that the bounty or grant in each case was found to reside in, and was measured by, an *excess* over the remission of excise taxes. Nor is that surprising in view of Treasury's practice, discussed infra. Thus, in *Franklin Sugar Refining* v. *United States*, 1 Ct. Cust. Appls. 242, T.D. 31276 (1911), a 2.50 mark "export bounty" was countervailed and a remitted 20 mark consumption tax was not. In *Nicholas* a British scheme involved tax remission *and* an "allowance" of 3d and 5d per gallon for exported spirits. On appeal in *American Express*, supra, this court found it unnecessary to review the Customs Court's broad interpretation of *Downs* and *Nicholas* and looked to the many *hidden* taxes which were remitted in excess of any remitted excise tax. *United States* v. *Hills Bros. Co.*, 107 F. 107 (2d Cir. 1901) involved excess rebates on sugar exports. *F. W. Woolworth Co.* v. *United States*, 28 CCPA 239 (1940), involved a bounty created by currency manipulation. In *Marion R. Gray* v. *United States*, 70 Treas. Dec. 811, T.D. 48679 (1936), the Customs Court stated, "* * * at least a part of the *excess* of Great Britain's drawback paid to the manufacturer, constitutes a bounty or grant * * * under section 303 of the tariff act involved." [Emphasis added. *Id.* at 813.]

United States v. *Passavant*, 169 U.S. 16 (1898), involved dutiable value, not countervailing duties. *F. W. Myers, supra*, involved an export duty governed by para. 393, Tariff Act of 1897, not the remission of an excise tax.

bestows a countervailable bounty or grant, we confront a case of first impression.[13]

The Statute

The intent of Congress, as expressed in § 303 itself, is not difficult to fathom. As the predecessor of this court, in *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), and the Supreme Court in *Nicholas,* 249 U.S. at 39, indicated, the words "bounty" and "grant" are broad but not ambiguous. "Net amount" necessarily means that countervailing duties should equate to the true bounty or grant actually conferred. Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty," "grant," or "net amount," in the statute or anywhere else, for almost 80 years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.

As this court's predecessor said in *Nicholas,* supra, 7 Ct. Cust. Appls. at 106: "It was a *result* Congress was seek-

[13] Judicial review of negative countervailing duty determinations was not sought before 1971 Congress made it available to manufacturers, producers and wholesalers in 1975, § 516(d), Tariff Act of 1930, as amended, 19 USC § 1516(d) (Supp. V 1975), in response to this court's recognition of its nonavailability to those groups in *Hammond Lead,* supra note 11.

Congress did not, however, require hearings and preparation of a hearing record from which it might be determined, on review, whether the Secretary's action was supported by substantial evidence or was arbitrary or capricious, in the manner practiced, for example, under the Administrative Procedure Act, 5 USC 551 et seq. Nor have the regulations, 19 CFR 159.47, Part 175 (1976), prescribed under § 516(h), done so. Congress did require hearings, on request, in antidumping cases, 19 USC 160(d) (Supp. V 1975).

ing to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done." On appeal in *Nicholas,* 249 U.S. at. 39, the Supreme Court said: "The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—'grant' as well as 'bounty' must be given effect."

Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the economic result of the foreign government's action which controls. Thus, the language of § 303, "[w]henever any country * * * shall pay or bestow * * * any bounty or grant," requires a factual inquiry. The statute assigns that factual inquiry, in the first instance, to the Secretary. Courts may review a factual record upon which a determination has been based, but are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action. In the present case, the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax. The Secretary has presumably determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303.

The factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack. On the contrary, the sole question on this appeal is whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law. Nothing in the statute itself so requires.

Legislative History

The imposition of countervailing duties, on imports other than sugar, was first provided for in § 5 of the Tariff Act of 1897, 30 Stat. 205. The parties agree that Congress repeatedly reenacted that basic provision without substantial

change (§ 6 of the Tariff Act of 1909, 36 Stat. 85; para. E of the Tariff Act of 1913, 38 Stat. 193; § 303 of the Tariff Act of 1922, 42 Stat. 935; § 303 of the Tariff Act of 1930, 46 Stat. 687; and as § 331(a) of the Trade Act of 1974, 19 USC 1303 (Supp. V 1975)).

The United States says the absence of definitions for "bounty," "grant" and "net amount" creates ambiguity, requiring resort to legislative histories of the Tariff Acts of 1890, 1894, and 1897. Zenith, as did the Customs Court, cites the Supreme Court's indication in *Nicholas,* supra, that "bounty" and "grant" are not ambiguous. Both parties have supplied extensive reviews of legislative history in support of their respective positions.

Respecting the legislative history behind "bounty," "grant," and "net amount," we are convinced, after careful review of the cited floor statements, committee reports, submissions and testimony, and after full consideration of the conflicting inferences drawn therefrom by the parties, that Congresses since 1890 have elected to refrain from stating that any specific condition would constitute a bounty or grant effective to require imposition of countervailing duties under § 303,[14] and to refrain from specifying a method of calculating net amount. Certain it is that nothing in the voluminous citations of record indicates a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us.

[14] The United States cites the exclusion of internal taxes remitted on exports from the cost of materials in determining constructed value, § 402(d), Tariff Act of 1930, as amended, 19 USC 1401a(d), and the including of such remitted taxes in determining purchase price under § 203, Antidumping Act of 1921, 19 USC 162 (Supp. V 1975), as indicating congressional evaluation of such remissions as neither unfair nor prohibitive. The point may be useful in urging consistency on the part of the Congress. It cannot, however, supply a congressional definition of "bounty," "grant" or "net amount" appearing in § 303.

Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead,* supra note 11: "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres," 58 CCPA at 137, 440 F.2d at 1030, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as "countervailing" duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage. Presumably enacting and reenacting § 303 in this broad light, illuminative of the statute's role in the world, Congress in its wisdom has simply refrained from calling all the countervailing duty plays in advance.[15]

[15] Congress' most recent reference to the international implications of export incentives and countervailing duties, and to the role of the Executive in connection herewith, appears in § 331(a), Trade Act of 1974, 19 USC 1303(d)(1) (Supp. V 1975):

> It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

To facilitate negotiations, Congress, while continuing to refrain from a definition of "bounty" or "grant," granted authority to the Secretary to suspend during the four years beginning January 3, 1975, and under certain conditions, the imposition of countervailing duties, after having determined that a bounty or grant is in fact being bestowed, 19 USC 1303(d)(2), and to reinstate such duties, 19 USC 1303(d)(3). In § 1303(e), Congress provided for reports to it of actions under § 1303(d)(2), and for the undoing thereof upon a resolution of disapproval by the Senate or the House.

Nothing, therefore, in § 303 itself, or in the cited and researched legislative history relating to the terms "bounty," "grant," or "net amount," aids the decisional process in the present appeal.

Congressional Ratification

The Customs Court considered the reenactments of § 5 of the 1897 Act as congressional ratification of the court's interpretation of *Downs*. We disagree.

The basis for the "ratification" view expressed below lies in a paragraph from a 1908 submission to the House Committee on Ways and Means:

> In Downs v. United States, 187 U.S. 496 (1903), it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar, which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, is equivalent to a bounty, and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty.[16]

An assumption that Congress had the quoted paragraph in mind, when it acted in 1909, would not warrant the further assumption that it thereby ratified a holding that excise tax remission alone is a bounty. The author of the submission said the tax remission was "in the form of a certificate having a substantial market value." We shall never know whether he interpreted *Downs* as merging remission and certificate elements of the Russian scheme or whether he considered the saleable certificates alone an excessive remission. We know only that a committee was

[16] *Notes on Tariff Revision* (1908). The quoted paragraph appears on page 834 of the 953 page document. The portions on court interpretation were prepared by an assistant counsel of the Treasury.

told that the Court had held excise tax remission "in the form of" saleable certificates equivalent to a bounty.

Moreover, if Congress must be assumed to have been informed of *Downs* in 1908, it must be equally assumed to have been better informed over the last half-century. In 1916, Congress established the Tariff Commission, 39 Stat. 796. In reporting to Congress in 1918, the Commission described *Downs:*

> The [Supreme] Court affirmed the decision of the Circuit Court of Appeals. The substance of the decision may be summarized as follows: "When a tax is imposed on all sugar produced but is remitted upon all sugar exported," *and* the exporter obtains from his government, "solely because of such exportation," a certificate which possesses an actual value and is saleable in the open market, the remission of the tax is in effect a bounty upon the exportation. [Emphasis added.] [17]

Thus, Congress was advised in 1918 that the bounty in *Downs* involved more than tax remission, and the Commission's report tends to defeat the notion that Congress, in reenacting § 303, intended to require the imposition of countervailing duties in response to tax remission alone.

In all events, the applicable statute is § 331(a) of the Trade Act of 1974, 88 Stat. 2049 (amending § 303 of the Tariff Act of 1930), 19 USC 1303, and rusted segments of legislative history, generated in other times, under other conditions, may be of limited value when recent segments, touching more current questions are available. As will be seen, the cognizant committees of the 93rd Congress did refer, albeit ambivalently, to the Treasury Department's in-

[17] United States Tariff Commission, *Reciprocity and Commercial Treaties*, 434 (1919) (available, Department of State Library).

terpretation of § 303 and its long-standing practice under that interpretation.

Administrative Practice

Since 1898, the Treasury Department has consistently and uniformly interpreted § 303 as requiring that there be an "excessive" remission of an excise tax, i.e., the governmental giving of something above and beyond mere excise tax remission, to have a bounty or grant.[18] Conversely, it has consistently and uniformly, for now almost 79 years, interpreted § 303 as not requiring that the mere remission of an excise tax, i.e., a "nonexcessive" remission of the type now before us, be deemed a bounty or grant.[19]

[18] See 1 Treas. Dec. 696, T.D. 19321 (1898); 2 Treas. Dec. 157, T.D. 19729 (1898); 2 Treas. Dec. 996, T.D. 20407 (1898); 26 Treas. Dec. 825, T.D. 34466 (1914); 54 Treas. Dec. 101, T.D. 42895 (1928); 56 Treas. Dec. 342, T.D. 43634 (1929); 73 Treas. Dec. 107, T.D. 49355 (1938). See also, the countervailing duty cases in note 12, supra.

[19] Treasury's administrative practice and some of its rationale was described to Congress in *Executive Branch GATT Studies*, S. Comm. on Finance, 93d Cong., 2d Sess. 11-12 (1974):

> Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on goods) to be a "bounty or grant" within the meaning of our countervailing duty statute • • • since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. • • • application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation • • • the United States would • • • impose • • • Federal and state excise taxes and state and local sales taxes, but would also collect, through • • • countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.
>
> The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

The Treasury Department has historically assumed that an excise tax is part of the price paid by home consumers. On the present record, that must be assumed true of the Japanese Commodity Tax. Where the tax is "paid" by home consumers, its remission on exports has not been considered a bounty or grant because the remission does not increase the manufacturer's profit margin. In recent years, a dichotomy has grown among economists regarding the possible difference in result when all or part of the tax is either "forward-shifted" or "absorbed." See the commentaries listed supra note 11, and Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law Pol. Int'l Bus. 85 (1970).

[20] For example, in *Copper Queen Mining Co.* v. *Territorial Board of Equalization*, 206 U.S. 474, 479 (1907), the Court was faced with an 18-year-old administrative interpretation of the statute. Justice Holmes wrote: "[W]hen for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

A long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, *Saxbe* v. *Bustos*, 419 U.S. 65 (1976), particularly where, as here, those charged with its administration adopted that practice contemporaneously with the inception of the statute, *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396 (1961), and when Congress has repeatedly reenacted the statute without change,[20] *Saxbe*, supra; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269, 273 (1933); *Komada* v. *United States*, 215 U.S. 392 (1910); *C. J. Tower & Sons* v. *United States*, 44 CCPA 41, 44 C.A.D. 634 (1957); *United States* v. *Lawrence*, 11 Ct. Cust. Appls. 203, 208, T.D. 38967 (1921), and when Con-

gress has failed to revise the statute in the face of such administrative practice, *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), and when Congress has refused requests to legislate a change, *United States* v. *Bergh*, 352 U.S. 40, 46 (1956); *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13 (1953). Moreover, to sustain an administrative interpretation of a statute, a court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commissioner* v. *Aragon*, 329 U.S. 143, 153 (1946). Under the Internal Revenue Code, "Treasury regulations and interpretations long continued without substantial change applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering, Commissioner* v. *Winmill*, 305 U.S. 79, 83 (1938).[21]

The Customs Court dismissed the effect of Treasury's administrative practice because it deemed that practice contrary to the law it had gleaned from *Downs*, and because it found a failure of Congress to codify the prac-

[21] The United States cites the reasonableness of its practice and numerous cases setting forth guidelines for judicial review of agency action under the Administrative Procedure Act. We are not, however, reviewing a record under that Act in this case. See, supra note 13.

The United States also argues that its long practice coincides with international agreements (e.g., the GATT) and with international practice, that international trade would become a shambles, and that trade wars would erupt, if the Secretary were now required to find that mere remissions of excise taxes bestowed bounties. Such arguments are irrelevant here. No agency practice may, for any reason, repeal a statute or overrule the courts. If the practice were in conflict with the statute, the intent of Congress, or judicial precedent, it could not stand, and such arguments would have to be directed to the Congress. If no conflict or inconsistency exists, the arguments are unnecessary.

tice. As above indicated, there is no judicial precedent contrary to or even inconsistent with the Treasury practice. So too, our study of the applicable legislative history from 1890 to 1975 finds no congressional action contrary to or inconsistent with the administrative practice.

The record does reflect unrequited suggestions to Congress that it enact the Treasury practice. We cannot, however, join the Customs Court in inferring therefrom a rejection or disapproval. At the outset, we find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it. The suggestions on which the Customs Court focused were not that Congress should legislate a new, unheard-of practice. Though the record shows the first specific notice to Congress in 1949,[22] we cannot assume that Congress had earlier reenacted the statute four times without ever informing itself of Treasury's practice. But whether awareness of the practice has continued for 79 or for 28 years, the inference of acquiescence from Congress' failure to act against the practice over the many years involved, and through many reenactments of the statute, overbalances any inference of rejection from failure to codify it.

In 1950, the Treasury proposed an amendment which would have codified its practice and required injury to domestic industry. Objections were raised only to the injury requirement.[23] Nonadoption of that amendment can

[22] *Extension of Reciprocal Trade Agreements Act, Hearings Before the Senate Comm. on Finance*, 81st Cong., 1st Sess., 1195-99 (1949) (memorandum).

[23] See H.R. 8304, 81st Cong., 2d Sess. (1951) and *Hearings on H.R. 1535 Before the House Comm. on Ways and Means*, 82d Cong., 1st Sess., 2, 79 (1951). See *Hearings on H.R. 5505 Before*

hardly be taken as proof of Congress' disapproval of Treasury's practice. The failure to adopt may have been due to concern over the injury requirement, or to any number of reasons. We shall never know. We do know that the proposal fully informed Congress of Treasury's long-practiced interpretation and administration of § 303. Congress' failure to act or even speak against it reflected at least a then-current willingness to allow that administrative practice to continue unabated and unchanged.

In 1968, the Senate Committee on Finance was advised that Treasury considered § 303 inapplicable to nonexcessive remissions of excise taxes.[24] Congress took no action at that time. In 1970, it requested a detailed study on the subject.[25]

In considering the proposed Trade Reform Act of 1973, which evolved into the Trade Act of 1974, the cognizant Committees of Congress were informed, not only of Treasury's long continued practice, *but of the very remission of the Japanese Commodity Tax and of Zenith's countervailing duty petition now before us.* At that time, also, an amendment defining "bounty or grant" as encompassing

---

the Senate Comm. on Finance, 82d Cong., 2d Sess., 115, 124-125 (1952).

In 1951, the State Department advised the Senate Finance Committee of the administrative practice under § 303 and that an amendment specifically stating that practice would merely clarify the law and would effect no change in the practice followed since the original enactment in 1897. See *Hearings on H.R. 1612 Before the Senate Comm. on Finance,* 82d Cong., 1st Sess., 1197 (1951).

[24] See 2 *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies,* Comm. on Finance, 90th Cong., 2d Sess. 475-476, 568-569, 887-889, 918-919 (1968).

[25] See S. Finance Comm. Rep. No. 91-1481 [to accompany H.R. 17550], 91st Cong., 2d Sess. 284-285 (1970).

the remission of an excise tax, the relief sought here,[26] was recommended by a witness but was not adopted.[27]

The Congress did adopt, however, as § 321(b) of the Trade Act of 1974, the administration's proposed amendment to § 203, Antidumping Act of 1921, 19 USC 162 (Supp. V 1975). The administration said the amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law. In recommending the amendment, the House Ways and Means Committee stated:

> • • • The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your com-

---

[26] The growing tendency of those who fail in their objective before the Congress to thereafter submit the same plea to undermanned federal courts is one factor contributing to the current appellate flood, which threatens to drown justice in the thrashings of a litigious sea. See D. Horowitz, The Courts and Social Policy 4-16 (The Brookings Institution, 1977). Sadly, moreover, the crowd can jam the courthouse door against the more deserving and less-advantaged.

[27] See *Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess., 2169-2171, 2496-2500, 3097, 3292-3293, 3814-3815 (1973). The Senate Committee on Finance Subcommittee on International Trade was so advised in 1971. See *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 102, 109-111 (1971). Though Congress' current interest in governmental assistance to foreign manufacturers may be assumed to have been occasioned by falling shares of the American market for American manufacturers, an abrupt change in a long-standing practice may have been viewed as both counter-productive in a trading world of increasingly interdependent economies and as injurious to American consumers on whom the countervailing duty might fall in the form of increased prices. However that may be, it is sufficient to our present task that Congress did not make the requested change in Treasury's practice.

mittee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.[28]

And the Senate Committee on Finance stated:

> • • • The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.[29]

The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties.[30] Finding no guidance in what the committees said, we look to what the Congress did.

---

[28] H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973).

[29] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974).

[30] That the two key committees of the Congress, with Treasury's treatment of the Japanese Commodity Tax law and the fact of Zenith's objections before them, and with full investigative powers and resources available, could not either approve or disapprove the administrative practice on its merits, is a dramatic exemplification of the reasons why a court should avoid entry into that policy thicket. Under appropriate conditions, courts may, as we do here, hold that an administrative practice reflects a permissible interpretation of a statute, while neither approving or disapproving the merits of the practice. Approving or disapproving the wisdom, effectiveness, etc., of an agency practice is a function of the Congress, the shifting of which to the courts conflicts with the fundamental separation of powers doctrine.

The adopted amendment to the Antidumping Act provides that in determining "purchase price" of imports there shall be added to the price charged the importer:

> [a] the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and [b] *plus* the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, *which rebate or noncollection has been determined by the Secretary to be a bounty or grant* within the meaning of section 303 of the Tariff Act of 1930 [Emphasis added. P.L. 93-618, § 321(b), 88 Stat. 2045 (amending 19 USC 162 (1970)).][31]

In so doing, Congress signaled its continuing intent to let the administrative practice under § 303 stand unmolested. Having decreased the number of taxes added to the purchase price in (a), to the disadvantage of the exporting manufacturer, Congress then added to the price, in (b), the amount of taxes "rebated or not collected" *and* "determined by the Secretary" to be a bounty or grant. If Congress intended that all rebates or noncollections by reason of exportation be deemed bounties or

---

[31] The United States argues that the Japanese Commodity Tax would fall within (a), rendering (b) redundant if Congress intended remission of such a tax to constitute a bounty or grant. On the premise that the Japanese tax is "added to or included in the price of such or similar merchandise" when sold in Japan, see note 19, supra, the argument has merit. Whether Japanese manufacturers absorb or shift the Japanese Commodity Tax, however, is an economic issue not before us.

grants, no room would have been left for Secretarial determination. In *American Express*, supra, we expressed the view that Congress required the Secretary to impose a countervailing duty when a bounty or grant has been bestowed, but left to the Secretary the determination of whether a bounty or grant had in fact been bestowed. Nothing has occurred since 1973 to require change in that view.[32]

Summary

Nothing in § 303, or in its legislative history, requires that the remission of an excise tax alone must be deemed a bounty or grant as a matter of law. Congress has, through many years and repeated reenactments of § 303, refrained from exercising its power to make such remission a bounty or grant as a matter of law. There is no judicial precedent requiring that under § 303 such remission

---

[32] This court expressed the same view in *United States* v. *Hammond Lead*, 58 CCPA at 134-139, 440 F.2d at 1027-28, 1031. The prompt congressional provision of judicial review, supra note 13, while remaining silent with respect to this court's description of the Secretarial function under the statute, further confirms Congress' acquiescence, in the Treasury's administrative practice.

We do not imply that the Secretary has carte blanche, or the right to be totally arbitrary or inconsistent in applying a longstanding practice. Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us. The value and effect of administrative practice, and the Secretary's authority to change it, have acquired statutory recognition in the field of customs. Under 19 USC 1315(d) (Supp. V 1975), a practice setting a particular duty, and found by the Secretary to have been uniform, can be changed to assess a higher duty, but only as to imports occurring at least 30 days after publication of the higher duty. In the Trade Act of 1974, Congress amended this section to exempt the assessment of countervailing duties from the 30 day delay provision and thus altered Treasury's practice. § 331(c), Tariff Act of 1974, 19 USC 1315(d) (Supp. V 1975). See [1974] U.S. Code Cong. & Ad. News 7320.

must be deemed a bounty or grant. The remaining tool in the decision-making inventory—a long-continued administrative practice not inconsistent with law—rests on an interpretation of § 303 as not requiring that such remission be deemed a bounty or grant.

As the Supreme Court said in *Saxbe* v. *Bustos*, 419 U.S. at 74:

> This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language.[33]

Paraphrasing what the Court later said in *Saxbe*, 419 U.S. at 79-80, to fit our case:

> Second, if • • • [a nonexcessive remission of an excise tax alone is now to be deemed a bounty,] the Congress [or the Executive] must do it. The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the Judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in laws. But the problem of • • • [changing a 79 year administrative practice effecting world

---

[33] Mr. Justice White's dissent in *Saxbe* saw the statute there involved as leaving nothing open to construction, the administrative practice as in conflict with the statute, the Congress as not having been shown aware of the practice and its silence, which may have been due to unawareness, preoccupation or paralysis, as inadequate proof of acceptance. In the present case, "bounty" and "grant" have remained undefined by Congress; the statute delegates to the Secretary the determination of what is a bounty or grant; the administrative practice is not in conflict with the statute, judicial decisions, or congressional expression; Congress has long and often been aware of the practice; and, concerning customs matters, Congress has in no manner been paralyzed.

trade] is not "interstitial" or, as Mr. Justice Holmes once put it, "molecular." It is a massive or "molar" action for which the Judiciary is ill-equipped.

Conclusion

Until lawfully changed, the administrative practice of the Treasury Department, in uniformly considering a non-excessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303. On this record, that interpretation is fully applicable to the Japanese Commodity Tax Law.

It follows that the Customs Court erred in granting Zenith's motion for summary judgment and in denying that of the United States. There being no issue of fact, the judgment of the Customs Court is reversed and the case is remanded for entry of an order granting the motion for summary judgment of the United States.

REVERSED

MILLER, Judge, dissenting, with whom BALDWIN, Judge, joins.

The issue is whether the Customs Court correctly determined that remission of the Japanese commodity tax upon export of the involved electronic goods, coupled with the levy of such tax on consumption of like goods in Japan, constitutes the payment or bestowal, "directly or indirectly," of a "bounty or grant" for purposes of section 303 of the Tariff Act of 1930, as amended (19 USC 1303).

Contrary to the majority opinion, I conclude that the controlling question is a matter of law and not a factual inquiry into the "economic result" of the Japanese commodity tax; that this is really not a case of first impression, since the key language of the statute has been interpreted by the Supreme Court before; that the interpretation by

the Court was basic to its decision and was not *obiter dictum;* that this judicial interpretation prevails over any long-continued administrative practice; and that Congressional "acquiescence" in such administrative practice is a myth.

I would affirm the decision and judgment of the Customs Court except with respect to the date as of which countervailing duties are to be imposed.

The facts

The Customs Court stated the "essential facts" as follows:

> The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax. [Footnote omitted.]

Additionally, in its answer to Zenith's complaint, the Government admitted that the commodity tax is levied on goods shipped for home consumption and that the tax base is generally the manufacturer's sales price; however, it denied, "for lack of knowledge or information sufficient to form a belief as to the truth therof," that the commodity tax rates set forth in the complaint were applicable to the enumerated products.[1] Nevertheless, most of the rates alleged are shown

[1] The complaint alleged the following rates: Large television receivers (20%); Small television receivers (15%); Color television picture tubes—large (20%) and small (15%); Radio receivers—stereo (15%), other than stereo (and other than housed in metal cases of specified dimension) (10%), and other than stereo housed

in *An Outline of Japanese Taxes* 130-34 (1975), published by the Tax Bureau, Ministry of Finance (Lib. Cong. Ref. No. HJ 2986 .A3 1975), of which we may take judicial notice.[2]

Controlling question a matter of law

The majority opinion declares that it is the economic result of the foreign government's action which controls [whether such action is a "bounty or grant"] and that this requires a factual inquiry. It then says that "the record is silent regarding the economic result of the mere remission of the Japanese commodity tax" and that "[t]he Secretary has presumably determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." To this it adds: "The factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack."

Of course, such "factual underpinnings" are not under attack, because there are none to attack. Indeed, even a *presumption* that the Secretary made a determination regrading the economic result is rebutted by the record. The majority opinion has confused the Secretary's determination of whether or not remission of the Japanese commodity tax constitutes the payment or bestowal, "directly or indirectly," of a "bounty or grant," which is a matter of

---

in metal cases of said specified dimension (5%); Radio-phonograph combinations (15%); Radio-television-phonograph combinations—if television qualifies for 20% rate (20%) and if television qualifies for 15% rate (15%); Record players and phonographs (15%); Tape players, tape recorders, and radio/tape recorder combinations—stereo (15%) and other (10%).

[2] The 5 to 40% range referred to by the Customs Court is shown in 1 W. Diamond, *Foreign Tax and Trade Briefs* 84.7 (1977), which notes that the commodity taxes "generally are paid by the manufacturer."

law, with the factual determination yet to be made by the Secretary of the "net amounts of the bounty or grant paid or bestowed" (on the basis of which countervailing duties are to be assessed) in accordance with the order of the Customs Court.[3]

Concerning the Secretary's "determination" here, all that the record shows is set forth in (1) the Notice of Preliminary Determination, approved by an assistant Secretary of the Treasury on January 30, 1975 (40 Fed. Reg. 5378), referring to the Notice of Countervailing Duty Proceedings[4] in the Federal Register of May 19, 1972 (37 Fed. Reg. 10087), and making a preliminary determination, on the basis of an investigation, that benefits under three Japanese programs (none of which related to the commodity tax) constituted bounties or grants, but were considered to be *de minimis;* (2) an amendment to said Notice of Preliminary Determination, approved by an Acting Assistant Secretary of the Treasury on May 2, 1975 (40 Fed. Reg. 19853), adding the following paragraph thereto:

> Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily deter-

---

[3] This court noted in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, 136, C.A.D. 1017, 440 F.2d 1024, 1029 (1971), that "in the case of the countervailing duty assessment, no injury to a domestic industry need be shown."

[4] The Notice stated that "Information has been received . . . which raises a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates, or refunds apply."

mined not to result in the payment or bestowal of a bounty or grant.[5]

and (3) the Final Negative Countervailing Duty Determination, approved by an Acting Assistant Secretary of the Treasury on December 31, 1975 (41 Fed. Reg. 1298), merely repeating the notice of Preliminary Determination that information developed in the investigation established that benefits under the three Japanese programs (unrelated to the commodity tax) were *de minimis* and concluding as follows:

> Accordingly, on the basis of the additional facts gathered and the investigation conducted . . . a final determination is hereby made in this proceeding, that for the reasons stated, herein and in the notice referred to above [the Notice of Preliminary Determination], no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 . . . upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan.

Thus, it is seem that there was no determination of economic result by the Secretary with respect to the Japanese commodity tax—not even a *de minimis* determination as in the case of the three other programs referred to—but only a conclusion of law that under any current programs, no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303. It is the correctness of this conclusion of law that was before the Customs Court, whose decision thereon we review.[6]

---

[5] The broad language could be construed to encompass the Japanese commodity tax.

[6] If the majority remains convinced that the economic result of the remission of the Japanese commodity tax is decisive of the issue before us, it should at least remand the case to the Customs Court for development of a record on that point, a task that court is specially equipped to undertake. Failing that, I suggest that the rates of the Japanese commodity tax are such as to establish prima facie that the economic impact (*e.g.* competitiveness of Japanese exports vis-a-vis U.S. manufacturers) of remission of the tax would not be *de minimis*. Significantly, the United States Tariff Commission (now International Trade Commission) made the following statement in its report to the Senate Finance Committee, 5 TRADE BARRIERS 39 (1974):

> For all but a very few U.S. products, the differential between domestic and export prices which is attributable to the exemption of exports from internal consumption taxes is substantially lower than the price differential found in products of most other major trading nations resulting from the exemption of exports from their domestic consumption taxes. [Footnote omitted.]

In its report, THE FUTURE OF U.S. FOREIGN TRADE POLICY, 90th Cong., 1st Sess. 5 (Comm. Print 1967), the Joint Economic Committee of the Congress stated:

> The European Common Market practice of rebating their own indirect taxes on their exports and levying these same taxes on imports—a practice sanctioned, incidentally, by the rules of the GATT—constitutes a conspicuous form of discrimination against U.S. exports. Moreover, similar border adjustments by the United States would be an ineffective weapon, neither mitigating nor offsetting the discriminatory process, because the tax structure of the United States places relatively small emphasis on indirect taxes. This issue is one that the United States will have to resolve.

[7] "That whenever any country . . . shall pay or bestow directly or indirectly, any bounty . . . upon the exportation of any article or merchandise from such country. . . ." There is no support for the statement in the majority opinion that there was "congres-

Key language of statute previously interpreted by Supreme Court

In *Downs* v. *United States*, 187 U.S. 496 (1903), the Supreme Court interpreted the key language of section 5 of the Tariff Act of 1897, 30 Stat. 205,[7] in the course of deciding, as the Court put it, *supra* at 500—

> the single question whether, under the laws and regulations of Russia, a bounty is allowed upon the export of sugar which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty, under [section 5 of the Tariff Act of 1897].

The Russian scheme relieved exporters from the ordinary excise tax that would have been payable had the sugar been sold domestically and also provided exporters with certificates which could be sold to sugar producers, who would use them to free-up their surplus sugar for sale in the domestic market without payment of a prohibitive tax burden.

As noted in the majority opinion, the Board of General Appraisers (4 Treas. Dec. 405, T.D. 22984 (1901)) stated, at 413:

> Our conclusion, therefore, is that a bounty or grant, within the meaning of section 5 of our tariff act, has been paid or bestowed by the Russian Government upon the exportation of this sugar, so as to work a benefit or advantage to the Russian sugar exporter as follows:
>
> First. Upon the exportation of the sugar, the Government remitted or refunded the excise tax due there-

---

sional refusal" to define the words "bounty" or "grant." Customs Law dictates that the common meaning of such words is intended in the absence of evidence to the contrary. *United States* v. *C. J. Tower & Sons*, 48 CCPA 87, 89, C.A.D. 770 (1961); *Meyer & Lange* v. *United States*, 6 Ct. Cust. Appls. 181, T.D. 35436 (1915). *Webster's International Dictionary* (1890) defines "bounty" as:

> 4. A premium offered or given . . . to encourage any branch of industry, as husbandry or manufactures.

It was merely customary legislative practice for Congress to leave it to the Treasury Department, subject to judicial review, to make individual determinations within such a broad definition.

> on . . . so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate which the Gevernment issued to him upon the exportation of his sugar had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward.
>
> Looked at from the Russian standpoint, these advantages might, perhaps, be described as a bounty on production, but (in the language of the circuit court of appeals in the Hills Brothers case [*United States* v. *Hills Bros. Co.*, 107 F. 107 (CA 2 1901)], *supra*) "from the standpoint of *other countries*," *they* become a bounty or grant on exportation." [Emphasis supplied.]

Although the Fourth Circuit, in affirming the Circuit Court for the District of Maryland, which had affirmed the Board (opinion unreported), held that the Government of Russia secured to the exporter of that country a money reward or gratuity whenever he exported sugar from Russia and premised that holding on its finding that the Russian exporter of sugar received a certificate, it said (*Downs* v. *United States*, 113 F. 144, 146 (CA 4 1902)):

> In affirming the decree of the court below, we also affirm the judgment rendered by the board of general appraisers, whose opinion so fully expresses our views, and so ably presents the facts involved herein and the law applicable thereto, that we deem it entirely appropriate to adopt the same as part of the opinion of this court.

It is clear that the Supreme Court regarded both the remission of excise taxes upon exportation and the provision of certificates to exporters in assessing the Russian scheme. However, the basis of its decision rested on its interpre-

tation of the key statutory language, particularly the term "bounty." Thus, it explained, *supra* at 502:

> A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015-3027, allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production. . . .

Later in its opinion, the Court applied this interpretation to the Russian government's remission of excise taxes as follows, *supra* at 515:

> The details of this elaborate procedure for the production, sale, taxation and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty on exportation.

With respect to the certificate part of the Russia scheme, the Court noted, *supra* at 512:

> It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production.

Referring to the certificate as an *additional* bounty, the Court then proceeded to answer petitioner's argument and determine that the certificate came within its interpretation of the key statutory language, *supra* at 513:

> If the additional bounty paid by Russia upon exported sugar were the result of a higher protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that these regulations exempt sugar exported from excise taxation altogether,* we think it clearly falls within the definition of an indirect bounty upon exportation. [Emphasis supplied.]

Thus, the fact that this "additional bounty" was coupled with remission of the excise tax, which the Court determined to come within its interpretation of "bounty upon exportation" in the statute, was the basis for its decision that the certificate was "an indirect bounty upon exportation." *Had the Court not determined that remission of the excise tax was a "bounty on exportation," its decision on the certificate portion of the Russian scheme would have been otherwise.*

Not to be overlooked is the fact that in their briefs before the Court, both Downs and the Government argued the question of whether the remission of excise taxes upon exportation of sugar is a "bounty or grant on exportation" as the terms were used in the statute, with Downs, the importer, contending in the negative and the Government saying (R 236):

> For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from the burden and is

not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty.

Nevertheless, the majority opinion would treat the Supreme Court's interpretation of the key language in section 5 as mere dictum, saying that the court's decision was that the Russian scheme (as a whole) bestowed a bounty and that "the broad language" (quoted above) "was not necessary to the Supreme Court's decision and was not, therefore, its ratio decidendi"; further, that the "broad language did not constitute a Supreme Court holding that every nonexcessive remission of every excise tax constitutes a bounty or grant as a matter of law." Of course, the quoted interpretative language did not say that every nonexcessive remission of every excise tax constitutes a bounty or grant. The Court carefully phrased its interpretation to couple with such remission the condition that such tax be paid on the articles when sold or consumed domestically.[8] To conclude that, because the decision had to do with the "Russian scheme," which included *two* bounties, (1) remission of the excise tax and (2) provision of certificates of value, the Court's interpretation of "bounty" with respect to the remission of the excise tax portion of the scheme is not ratio decidendi is manifestly erroneous. As pointed out above, that interpretation was the basis for the decision that the certificate portion of the scheme was an indirect bounty upon

[8] Whether the "bounty or grant" in a particular case would be *de minimis* (not, therefore, warranting imposition of a countervailing duty) or what the net amount of the "bounty or grant" would be as a basis for imposition of a countervailing duty is, of course, another matter. Thus, as appellant has shown, the market value of the certificate in *Downs* was from 1.25 to 1.64 rubles per pood, and the excise tax remitted was 1.75 rubles per pood; whereas, the *net* bounty determined ranged from only .38 to .50 rubles per pood (T.D. 22814, 4 Treas. Dec. 181 (1901)). It is not disclosed what factors entered into the determination. See *F. W. Woolworth Co.* v. *United States*, 28 CCPA 239, C.A.D. 151 (1940).

exportation. Moreover, since the Supreme Court clearly determined that *both* remission of the excise tax and the certificate constituted a bounty, there were two grounds upon either of which it rested its decision. Each ground represented the judgment of the court and was of equal validity with the other. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948); *Richmond Co.* v. *United States*, 275 U.S. 331, 340 (1928); *United States* v. *Title Insurance Co.*, 265 U.S. 472, 486 (1924); *Union Pacific Co.* v. *Mason City Co.*, 199 U.S. 160, 166 (1905); *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143 (1880).

Thus, the Court's determination that remission of the excise tax was a "bounty" did not constitute mere *obiter dictum* as did the statement treated in *Kastigar* v. *United States*, 406 U.S. 441 (1972), cited by the majority, whose assertion that "we confront a case of first impression" simply begs the question. Rather, the Court's interpretation is akin to the Court's explanation in *Towne* v. *Eisner*, 245 U.S. 418 (1918), of the essential nature of a stock dividend in interpreting the Income Tax Act of October 3, 1913.[9] That explanation was relied upon by the Court

[9] In *Towne* v. *Eisner*, the question was whether a stock dividend made in 1914, against surplus earned *before* the effective date of the Sixteenth Amendment, was taxable under the Income Tax Act of October 3, 1913. The lower court had decided for the taxpayer, treating the question as inseparable from interpretation of the Sixteenth Amendment. The Supreme Court disposed of the question upon consideration of the essential nature of a stock dividend, disregarding the fact that the dividend involved was based upon surplus earnings that accrued before the Sixteenth Amendment took effect, and quoting from its opinion in *Gibbons* v. *Mahon*, 136 U.S. 549 (1890) as follows:

> "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence

in *Eisner* v. *Macomber*, 252 U.S. 189 (1920), where the question was whether a stock dividend, made against profits accumulated by a corporation *after March 1, 1913*, was taxable under the Revenue Act of 1916. In affirming the judgment below for the taxpayer, the Court said, *supra* at 204-05:

> Therefore, *Towne* v. *Eisner* cannot be regarded as turning upon the point that the surplus accrued to the company before the act took effect and before adoption of the Amendment. And what we have quoted from the opinion in that case cannot be regarded as *obiter dictum*, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there . . . because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

In its efforts to downgrade *Downs*, the majority opinion ignores the Supreme Court's own recognition of its precedential value in *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), which involved the petitioner's protest against the action of collectors of customs at Boston and New York assessing countervailing duties on whiskey and gin imported from Great Britain. The Supreme Court affirmed the judgment of the Court of Customs Appeals (the predecessor to this court), which had affirmed a de-

---

which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons* v. *Mahon*, 136 U.S. 559, 560. In short, the corportation is no poorer and the stockholder is no richer than they were before. . . . What has happened is that the plaintiff's older certificates have beer split up in effect and have diminished in value to the extent of the value of the new. [*Id.* at 426-27.]

cision by the Board of General Appraisers (the predecessor to the Customs Court) overruling the protests. The issue was the legality of the countervailing duty, which had been determined to be necessary under Paragraph E of section 4 of the Tariff Act of 1913 (38 Stat. 114)[10] by reason of the allowance under British law of three pence per gallon upon plain British spirits and five pence per gallon upon British compounded spirits paid on account of export from the United Kingdom.[11] Referring to Paragraph E, the Court, *supra* at 39, said:

> The statute was addressed to a condition and its words must be considered as intending to define it,

---

[10] Paragraph E was substantially the same as section 303 of the Tariff Act of 1930 and as section 303(a)(1) under the 1970 amendment, the statute herein involved. Paragraph E was preceded by Paragraph E of section 4 of the Tariff Act of 1913 (38 Stat. 114, 193); section 6 of the Tariff Act of 1909 (36 Stat. 11, 85); and section 5 of the Tariff Act of 1897(30 Stat. 151, 205). Prior to the latter, paragraph 182½ of the Tariff Act of 1894 (28 Stat. 509, 521) provided for payment of additional duty on sugar, syrups, and molasses where the exporting country paid a *bounty* on the export thereof; and paragraph 237 of the Tariff Act of 1890 (26 Stat. 567, 584) made similar provision in the case of sugar only. In its brief, the Government contends that the 1897 Act was intended to apply to the refund of taxes only to the extent that the "refund" exceeded the amount of tax actually paid (*i.e.* the "excessive remission"). This appears to have been so under the specific language of the 1890 and 1894 Acts. However, different language appeared in the subsequent acts, and the legislative history of the 1897 Act cited by the Government can hardly be used now to overturn the Supreme Court's interpretation in *Downs* of "bounty" in the 1897 Act. The Government's argument, of course, has no application to "grant" (added by the 1897 Act). If it did, it would imply that there was no Congressional purpose in adding "grant" to the language of the statute.

[11] The law also provided for payment of an allowance of two pence per gallon "to any Distiller or Proprietor of . . . Spirits on the Exportation thereof from a Duty-free Warehouse, or in depositing the same in a Customs Warehouse." However, this payment was not involved in the case.

and all of them—"grant" as well as "bounty" must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required by Paragraph E.

The Court next, *supra* at 39-40, stated, in language reminiscent of *Downs,* the pragmatic principle on which it rested its decision that the payment by the British government was the bestowal "directly or indirectly" of a "bounty or grant":

> We have the fact of spirits able to be sold cheaper in the United States than in the place of their production, and this the result of an act of government because of the destination of the spirits being a foreign market. For that situation Paragraph E was intended to provide.

The Court cited *United States* v. *Passavant,* 169 U.S. 16 (1898), as support for its pragmatic approach, saying: "It [the Court in *Passavant*] regarded the fact and effect of the remitted excise."[12] It then recognized the precedential value of *Downs,*[13] *supra* at 41:

---

[12] *Passavant* held that in determining dutiable value of goods imported from Germany, there should be added to the net invoice price the amount of tax imposed upon the goods when sold by the manufacturer thereof for consumption or sale in Germany but remitted upon exportation of the goods.

[13] As had the Government in its brief, saying of *Downs*:

> The Russian bounty case was summed up in a single sentence in the opinion (187 U.S. 515): "When a tax is imposed on all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation."

> *Downs* v. *United States,* 187 U.S. 496, is a like example [of the pragmatic approach], and direct and indirect bounties are illustrated. . . . [*A*]*s instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given,* and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden. [Emphasis supplied.]

If the majority's erroneous approach to precedent were followed, the judicial function of statutory interpretation would be reduced to merely deciding that the facts of a particular case are or are not within the reach of a particular statute. The judicial function of giving life and meaning to the words of a statute for guidance to other courts as well as to the executive and legislative branches of government would be emasculated, and interminable litigation would be spawned.[14]

Judicial interpretation prevails over "long-continued, uniform, administrative practice"

The majority opinion states that, since 1898, the Treasury Department has consistently and uniformly interpreted § 303 as requiring that for a remission of an excise tax to constitute a bounty it must be "excessive."[15] It

---

[14] Cf. E. GRISWOLD, THE JUDICIAL PROCESS 31 (1973): "In many areas precedents, especially ones of a few years' standing, are not given very great weight. This in turn stimulates litigation on a great mass of questions. . . ."

[15] This statement apparently does not take account of the countervailing duties assessed by Treasury in *Downs* and the Govern-

then cites the familiar rule that long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, particularly when Congress has failed to revise the statute in the face of such administrative practice; and it finds no Congressional action contrary to or inconsistent with that practice. However, it is to be noted that in none of the cases cited by the majority opinion had there been a judicial interpretation with which the administrative practice was in conflict!

There is another familiar rule, namely: continued reenactment of a statute following its judicial interpretation (especially by the Supreme Court) creates a presumption of Congressional approval of that interpretation. *Shapiro* v. *United States,* 335 U.S. 1, 16 (1947); *Burnet* v. *Harmel,* 287 U.S. 103, 108 (1932); *Hecht* v. *Malley,* 265 U.S. 144, 153 (1924); *Latimer* v. *United States,* 223 U.S. 501, 504 (1912); *Sessions* v. *Romadka,* 145 U.S. 29, 42 (1892). As will be more fully developed later, there has been no Congressional action contrary to or inconsistent with the interpretation of the key statutory language in *Downs.*

When there is a conflict between administrative practice and judicial interpretation, as has been the case here, this court's predecessor long ago held that judicial interpretation prevails. *United States* v. *Douglas & Berry,* 6 Ct. Cust. Appls. 100, T.D. 35342 (1915). That case involved the question of whether the imported goods in

---

ment's position in its brief before the Supreme Court in support thereof, wherein the Assistant Attorney General went so far as to say (R. 236):

> For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty.

question were classifiable as "plain woven fabrics" under paragraph 283 of the Tariff Act of 1913. In two earlier cases, the court had interpreted identical language in the predecessor provisions to paragraph 283 (contained in the Tariff Acts of 1897 and 1909 and had rejected the classification of similar goods as "plain woven fabrics." Responding to the importers' argument that goods like those in question were, during the history of the Tariff Act of 1909, classified as plain woven fabrics and that employment of that language in the Tariff Act of 1913 must be presumed to be a recognition of such administrative practice, the court said *supra* at 104:

> Force is often given to such administrative practice, but in the present case it is difficult to see how it could have the force contended for, for the reason that prior to the enactment of this tariff law rulings of this court had been made in the two cases cited, and more specifically and definitely in the later case of White *v.* United States (3 Ct. Cust. Appls., 382; T.D. 32968), that excluded the goods in question from the term "plain woven fabrics," and *it is the latter authoritative decision which the Congress must be presumed to have followed rather than the administrative practice.* [Emphasis supplied.]

The fact that the executive branch does not follow the interpretation of a law by the judicial branch does not render that interpretation any less the law. Nor would acquiescence by the legislative branch in the failure of the executive branch to follow the interpretation of the law by the judicial branch do so. Indeed, a contrary conclusion would deny the role of the judicial branch in our system of government "to say what the law is," as declared in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 87, 111 (1803).

The myth of Congressional acquiescence in administrative practice

Although the principle stated in *United States* v. *Douglas & Berry* disposes of the administrative practice point, the following portion of the majority opinion should be answered:

> [W]e find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it. . . . Though the record shows the first specific notice to Congress in 1949, we cannot assume that Congress had earlier reenacted the statute four times without ever informing itself of Treasury's practice. But whether awareness of the practice has continued for 79 years or for 28 years, the inference of acquiescence from Congress' failure to act against the practice over the many years involved, and through many reenactments of the statute, overbalances any inference of rejection from failure to codify it. [Footnote omitted.]

Actually, the record shows that the "first specific notice to Congress" came in 1949 during the course of hearings before the Senate Finance Committee. In 1970 Congress amended section 516 of the Tariff Act of 1930 to provide that, in the case of any imported article or merchandise with respect to which the Secretary has not determined whether or not any bounty or grant is being paid, any person may file a petition setting forth his belief that a bounty or grant is being paid.[16] The Customs Administrative Act of 1970 § 209, Pub. L. No. 91-271, 84 Stat. 274,

[16] If the Secretary concludes that a formal investigation is warranted, he is to initiate one, make a preliminary determination within six months, and make a final determination within twelve months.

286. (Zenith filed such a petition in this case.) So the period of "awareness" of Treasury's practice on the part of "Congress" before it endeavored to do something about the practice shrinks from 79 to 21 years. The supposition in the majority opinion of a longer period of "awareness" on the part of *Congress* is pure speculation.

As Judge Newman noted in his concurring opinion below, the Treasury Department attempted to persuade Congress to amend section 303 of the Tariff Act of 1930 to accord with the Department's practice of not assessing countervailing duties on the remission of taxes.[17] This and another attempt (by the State Department)[18] failed. In the perspective of the principle stated in *United States* v. *Douglas & Berry, supra,* Judge Newman aptly remarked:

> It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the . . . proposed amendments . . . is that Congress was satisfied with the way it had earlier written the statute, and ap-

[17] *Hearings on H.R. 1535 Before the House Committee on Ways and Means,* 82d Cong., 1st Sess. 2, 16, 35, and 79 (1951). (H.R. 1535, which would have been entitled "Customs Simplification Act of 1951," was introduced "by request" of the Secretary.) *Hearings on H.R. 5505 Before the Senate Committee on Finance,* 82d Cong. 2d Sess. 115, 124-125 (1952). (H.R. 5505 supplanted H.R. 1535 as a "clean bill.")

[18] The Department's representative advised the Senate Finance Committee that an amendment to conform section 303 with administrative practice was needed to make the countervailing duty law fully consistent with Article VI of the General Agreement on Tariffs and Trade. *Hearings on H.R. 1612* ("Trade Agreements Extension Act of 1951") *Before the Senate Committee on Finance,* 82d Cong., 1st Sess. 11 (1951).

proved of the Supreme Court's construction of the law.[19]

The majority opinion recalls that during hearings before the House Committee on Ways and Means in 1973 on the bill which matured into the Trade Act of 1974 (Pub. L. No. 93-618, 88 Stat. 1978), "a witness" recommended an amendment defining "bounty or grant" as encompassing the remission of an excise tax and that there was no action taken on the recommendation. This can hardly be said to rise to the level of Congressional acquiescence in administrative practice, much less a repudiation by Congress of the interpretation of the key language in section 303 by the Supreme Court.

The majority opinion points to Congressional adoption, as § 321(b) of the Trade Act of 1974, of an amendment to the Antidumping Act, 19 USC 162 (Supp. V 1975), which parallels the standard in that Act to the standard set forth in the countervailing duty law; further, to the following statements in the committee reports:

> However, your committee [Ways and Means], in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes. [H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973).]

[19] The majority opinion notes an earlier unsuccessful attempt by Treasury in 1950, but says: "Congress' failure to act or even speak against it [the Treasury proposal] reflected at least a then-current willingness to allow that administrative practice to continue unabated and unchanged." Such a comment ignores the principle stated in *United States* v. *Douglas & Berry, supra.* The correct conclusion to be drawn from failure of the Treasury proposal is that stated by Judge Newman. See *United States* v. *Adolphe Schwob, Inc.*, 21 CCPA 116, 120, T.D. 46447 (1933).

And—

> The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However, the Committee [Senate Finance], in recommending this amendment, does not express approval or disapproval of that Treasury practice. [S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974).]

On the basis of the foregoing, the majority opinion concludes: "The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties." Again the majority ignores the principle stated in *United States* v. *Douglas & Berry, supra.* The correct conclusion is that such statements left untouched the status quo with respect to the Supreme Court's interpretation of the key language in section 303.

The majority opinion notes that, in 1968, the Senate Finance Committee was advised that Treasury considered § 303 inapplicable to nonexcessive remissions of excise taxes; that no action was taken at that time; and that, in 1970, the Committee requested a detailed study on the subject. The "request" was a direction to the Tariff Commission contained in section 362 of H.R. 17550, which did not become law. The Senate Finance Committee, in its report on the bill (S. Rep. No. 91-1431, 91st Cong., 2d Sess. 281 (1970)) stated, *inter alia:*

> The committee is also aware of the Supreme Court cases, and a recent Customs Court case which has interpreted the words "bounty" or "grant" to apply to virtually all subsidies, including the rebate of indirect taxes.

A request for a study was subsequently made jointly by the chairman of the Senate Finance Committee and the chairman of the Subcommittee on International Trade to the Tariff Commission, which transmitted its voluminous report, TRADE BARRIERS, *supra* note 6, in 1974.[20] This can hardly be said to rise to the level of a repudiation by the Congress of the interpretation of the key language in section 303 by the Supreme Court. Rather, the request for a study by the Tariff Commission constituted merely a prudent step by a Congressional Committee to acquire information needed to make a decision whether to recommend any changes in the law beyond the 1970 amendment, referred to above, providing for the filing of a petition by any person setting forth his belief that a bounty or grant is being paid. Following receipt of the Trade Commission's report, the judicial review provision, discussed *infra,* was enacted as part of the Trade Act of 1974.

Referring to this court's opinion in *American Express Co.* v. *United States,* 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973), the majority opinion says that "we expressed the view that Congress required the Secretary to impose a countervailing duty when a bounty or grant has

[20] Of particular significance, the report (Vol. VI at 30-31) states:

> Several governments provide tax advantages to exporters. This is done usually by exempting or deferring taxes on income from export activities, or rebating other direct taxes associated with the production of exported products, or by accelerated amortization of assets used in production for export.
>
> Under current GATT rules, indirect (consumption) taxes may be rebated (or not collected) on exported products, but rebates of direct taxes (income and certain other taxes) are not permitted. This rule is based on the premise that indirect taxes are fully shifted forward to the consumer, whereas direct taxes are not. To the extent, however, that the forward shifting of indirect taxes is incomplete, the full restitution of the domestic consumption tax at the border on exported products acts, in effect, as a subsidy of exports. [Footnote omitted.]

been bestowed, but left to the Secretary the determination of whether a bounty or grant had in fact been bestowed" and that "[n]othing has occurred since 1973 to require change in that view." However, a close reading of the opinion in that case reveals no suggestion whatsoever that this court would approve a Secretarial determination that was contrary to the interpretation of "bounty" by the Supreme Court. With respect to what has occurred since 1973, provision in the Trade Act of 1974 for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise reflects, as shown *infra* note 26, expressed *Congressional concern* over "inaction or insufficient action, or . . . excessive delay in the administrative process."

That provision was enacted in response to the majority opinion of this court in *United States* v. *Hammond Lead Products, Inc., supra* note 3. Hammond Lead had filed a complaint with the Commissioner of Customs asserting that litharge[21] imported from Mexico was the recipient of a bounty or grant from the Mexican government and, therefore, that a countervailing duty was required to be imposed under section 303 of the Tariff Act of 1930. The Commissioner of Customs, acting for the Secretary, responded that the classification and rate of duty on litharge were correct and that countervailing duties were not applicable. Hammond Lead then brought an action in the Customs Court under section 516(b) of the Tariff Act of 1930, protesting the classification and rate of duty. The Government and one Ralph Valls, Party-In-Interest, moved to dismiss on the ground that the Customs Court lacked jurisdiction of the subject matter of an American manufacturer's protest which complained that the Secretary failed to invoke a countervailing duty. Motions to

[21] The court stated that litharge is a lead oxide, made from refined lead by a simple process and containing 93% primary lead metal. Its main use is in storage batteries and in the chemical and paint industries.

dismiss were denied, and trial on the merits followed. The Customs Court sustained Hammond Lead's protest on the theory that there was an indirect bounty or grant on export of the litharge from Mexico.[22]

On appeal, this court, split 3-2, held that the Customs Court lacked jurisdiction.[23] It concluded, *supra* at 137:

> All considered, it appears that countervailing duty is a penal exaction [24] that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516(b) proceeding . . . .

In the course of extended dicta, the majority opinion obliquely referred to the "dicta" in *Downs* and went on to say, *supra* at 140-41:

> It may be asked, if our interpretation of section 516(b) is correct, does it leave the American Manufacturer entirely remediless even in case of an arbitrary and capricious refusal by Treasury to take appropriate action under the countervailing duty law. It is difficult to answer the question without deciding in

[22] Following devaluation of the peso in 1954, Mexico increased export taxes on refined lead for the purpose of maintaining domestic supplies and keeping down domestic prices. Refined lead was made available to domestic users at a price approximating the world price minus what the export tax would have been. Exports of litharge were not subjected to the export tax, so that Mexican litharge producers could offer litharge in other countries at a price predicated on the domestic lead price unenhanced by the export tax.

[23] The dissenting opinion concluded that the Customs Court had jurisdiction of the protest under section 516(b), citing ***Bradford Co.*** v. ***American Lithographic Co.***, 12 Ct. Cust. Appls. 318, T.D. 40318 (1924). Further, it stated that the Customs Court was correct in concluding that there was a bounty or grant, citing the definitions thereof in *Nicholas* and *Downs, supra.*

[24] The statement that a countervailing duty is "penal" was repudiated in a 1972 Senate Finance Committee report. ***Infra,*** note 26.

dictum cases not before us, but a few observations will be made. The Second Circuit, in *J. C. Penney Company, Inc.* v. *United States,* 439 F.2d 63 (decided March 1, 1971), has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. . . . Thus it may be that any decision limiting 516(b) may correspondingly limit the access of a complaining domestic industry to any kind of court relief. On the other hand, the modern tendency to fashion a remedy for any injury is a strong one, and it could be the regular courts would take jurisdiction in cases outside section 516(b), where the domestic industry showed clear illegality and substantial injury. Such a proceeding would not be a *de novo* determination like the one the court below made here, but would, we think, be more in the nature of a review of the administrative decision, which would be overturned only if found arbitrary, capricious, or not founded on substantial evidence. A court considering the fashioning of such relief would have to consider its need in light of judicial remedies, and also such extrajudicial ones as the domestic industry might have, in resort to the Congress or to the Tariff Commission. We do not undertake to predict the answer.

The response of Congress was to include in the Trade Act of 1974 an amendment to section 516 which, as noted above, provides for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise.[25] As a prelude to this Congressional

[25] Review can be sought in the Customs Court by "an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination."

action, in 1972 the Senate had tacked onto a minor House-passed tariff bill an amendment, providing for judicial review, at the instance of American producers, of negative countervailing duty determinations by the Secretary.[26] Although the amendment was accepted by the House-Senate conferees (H.R. Rep. No. 92-1583, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1298, 92d Cong., 2d Sess., (1972)) the Conference Report was not brought to a vote in the

[26] In reporting out the amended bill, the Senate Finance Committee report (S. Rep. No. 92-1221, 92d Cong., 2d Sess. 8 (1972)) stated:

> The Committee amendment providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*) holding that judicial review was not available to American producers in countervailing duty cases. The Committee is concerned that the decision might adversely affect the ability of American producers to obtain meaningful relief against subsidized import competition under the Countervailing Duty Law (section 303 of the Tariff Act) because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.
>
> In addition, importers enjoy the right to judicial review in countervailing duty cases under existing law. The Committee believes that American producers as well as importers should be permitted to have the right to judicial review in countervailing duty cases as a matter of basic equity and fairness, and as a means to secure administration of the law in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303.
>
> The Countervailing Duty Law requires the Secretary of the Treasury to assess an additional duty on imports of dutiable articles with respect to which a bounty or grant has been paid. The additional duty must be equal to the amount of the bounty or grant, thereby neutralizing the artificial advantage afforded the foreign product by virtue of the subsidy. Consequently, countervailing duties are not, nor were they ever intended to be, penal in nature: they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded foreign merchandise.

House as an accommodation to the Secretary, with the understanding that the matter would be given attention in the context of trade legislation in the next Congress (118 Cong. Rec. 37098 (1972)). The judicial review provision was subsequently included in the House-passed version of what became the Trade Act of 1974, with the House Ways and Means Committee Report expressing similar views to those of the Senate Finance Committee (quoted in note 26, *supra*) in its report accompanying the 1972 bill (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973)).

In view of the foregoing, the conclusion is inescapable that the Congress has not acquiesced in the administrative practice of failing to recognize the ordinary remission of excise taxes as a bounty or grant for purposes of section 303, much less repudiated, or given any signal of its disfavor with, the interpretation of the key language in section 303 by the Supreme Court.

Date for imposition of countervailing duties

The Customs Court ordered that countervailing duties be assessed on the subject electronic products exported from Japan effective the day following the date of entry of its order. Section 516(g) of the Tariff Act of 1930, as amended (19 USC 1516(g)), provides that only merchandise entered for consumption (or withdrawn from warehouse for consumption) after the date of *publication* of a Customs Court's decision will be affected. Therefore, the Government argues that the Customs Court's order in this case "encompasses entries the liquidation of which is not the proper subject of direction by the Customs Court under the enabling statute, which is clearly jurisdictional in its scope and effect." Appellee contends that *entry* of the Customs Court's order constituted "*publication*" for purposes of section 516(g) and that the Customs Court's order was proper.

Section 257 of 28 USC provides that all decisions of the Customs Court shall be filed and be open to inspection and that the Secretary shall *publish* weekly such decisions as he or the court may designate and abstracts of all other decisions. Thus, the statutes distinguish between filing or entry of a decision and *publication* thereof, which obviously would not occur simultaneously with the filing or entry. Until January 4, 1967, publication was in "Treasury Decisions." Effective January 4, 1967, the name was changed to "Customs Bulletin" (31 Fed. Reg. 16580).

Although appellee argues that "publication" means "making available to the public," which would occur upon the filing or entry of court orders and decisions, I am satisfied that the word "publication" in section 516(g) and the word "publish" in section 257 are in pari materia; further, that acquiescence by Congress in the Secretary's practice of carrying out its mandate in section 257 creates a presumption of Congressional approval of that practice. Appellee has provided no evidence clearly showing Congressional disapproval of that practice.

Accordingly affirmance of the Customs Court's decision and judgment with respect to the Japanese commodity tax should be coupled with an order that the order of the Customs Court with respect to the imposition of countervailing duties be modified (1) to become effective the day after the date of publication of its decision in the Customs Bulletin and (2) to provide that assessment of countervailing duties be subject to possible suspension under the provisions of 19 USC 1303(d)(2).

APPENDIX D

APPENDIX D

Statutes Involved

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V 1975):

Countervailing duties.

(a) Levy of countervailing duties.

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed,

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within six months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within twelve months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

(6) The Secretary shall make all regulations he deems necessary for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b)(1) or this section (whether affirmative or negative) shall be published in the Federal Register.

(b) Injury determination with respect to duty-free merchandise; suspension of liquidation.

(1) Whenever the Secretary makes a final determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2) of this section, he shall—

(A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of his final determination under subsection (a) of this section, and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (3).

(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

(3) If the determination of the Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of

duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a) of this section.

(c) **Application of affirmative determinations.**

An affirmative final determination by the Secretary under subsection (a) of this section with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1) of this section.

(d) **Temporary provision while negotiations are in progress.**

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

(e) **Reports to Congress.**

(1) Whenever the Secretary makes a determination under subsection (d)(2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives

and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2192 of this title, then such determination under subsection (d)(2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

Section 516(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(d) (Supp. V 1975):

Petitions by American manufacturers, producers, or wholesalers.

• • • • • • • • • • •

(d) **Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.**

Within 30 days after a determination by the Secretary——

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of

such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

Section 331(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2049, 2053 (1975).

Amendments to Sections 303 and 516 of the Tariff Act of 1930.

• • • • • • • • • • •

(d)(1) The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) For purposes of applying the provisions of section 303(a)(4) of the Tariff Act of 1930 (as amended by subsection (a)) with respect to any investigation which was initiated before the date of the enactment of this Act under section 303 of such Act (as in effect before such date), such investigation shall be treated as having been initiated on the day after such date of enactment under section 303(a)(3)(B) of such Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).

Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,
Petitioner
v.
UNITED STATES,
Respondent

AMICUS BRIEF OF UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

D. B. KING
J. J. MANGAN
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

TABLE OF CONTENTS

PAGE

Interest of the Amicus Curiae 2

Summary of Argument 5

Reasons for Granting the Writ of Certiorari 6

A. The Court of Customs And Patent Appeals Decision Repudiates Decisions Of The Supreme Court Of The United States 6

B. The Decision Of The CCPA Nullifies The Congressional Judicial Review Provisions Of The Trade Act Of 1974 17

Conclusion 24

TABLE OF AUTHORITIES

CASES PAGE

American Express Co. v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd*, 60 C.C.P.A. 86, C.A.D. 1087, 472 F.2d 1050 (1973) 7

Downs v. *United States*, 187 U.S. 496 (1903) 9, 10, 11, 12, 24

Hammond Lead Products, Inc. v. *United States*, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969), *rev'd.* 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971) 18

Hammond Lead Products, Inc. v. *United States*, 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971) 18, 20, 21, 22

Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) 12, 15, 16, 24

United States v. *Passavant*, 169 U.S. 16 (1898) 7, 11, 24

Zenith Radio Corporation v. *United States*, 78 Cust. Ct. ——, C.D. 4691, 430 F. Supp. 242 (1977), *rev'd*, 64 C.C.P.A. ——, C.A.D. 1195, —— F.2d —— (1977) 6, 10, 11, 16, 23, 24

Zenith Radio Corporation v. *United States*, 64 C.C.P.A. ——, C.A.D. 1195, ——F.2d—— (1977) 3, 4, 5, 16, 20, 21, 22, 23, 24

STATUTES	PAGE
Tariff Act of 1897, 30 Stat. 205, Section 5	11
Tariff Act of 1930, 46 Stat. 687	
Section 303 (19 U.S.C. § 1303)	11
Section 516 (19 U.S.C. § 1516)	18
Trade Act of 1974, Public Law 93-618 (1975)	
Section 331	18, 19, 21

OTHER	
H.R. Rep. No. 93-571 (Committee on Ways and Means), 93d Congress, 1st Sess. (1973)	19
S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. (1974)	17, 19
Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Congress, 1st Sess. (1973)	21
Brief of the United States filed with the Supreme Court in *Nicholas*	15
Transcript of interview of the Honorable Russell B. Long, Chairman of the Senate Committee on Finance, published in the Daily Report for Executives, No. 141 at p. J-1 (July 21, 1977)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,
Petitioner
v.
UNITED STATES,
Respondent

AMICUS BRIEF OF UNITED STATES STEEL CORPORATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

INTEREST OF THE AMICUS CURIAE

The Solicitor General of the United States has graciously granted consent of the government of the United States to United States Steel Corporation to file an *amicus curiae* brief in support of the petition of Zenith Radio Corporation. The Petitioner, Zenith Radio Corporation, has likewise extended by written permission its consent to the filing of an amicus brief by U. S. Steel.[1]

United States Steel Corporation initially filed countervailing duty complaints with the U. S. Treasury in September of 1968 alleging that the rebate or remission of the value-added taxes or cascade taxes, which obtained in six nations of the European Community, constituted a bounty or grant under our countervailing duty law. Those cases remained unresolved before Treasury until they were withdrawn by U. S. Steel in 1975.[2] U.S. Steel thereafter refiled updated complaints with the Treasury on September 18, 1975, alleging that the rebate or remission of the value-added tax in seven of the European Community nations constituted a subsidy under the countervailing duty law. On October 20, 1975,

---

1. Letter dated August 25, 1977, from the Solicitor General of the United States, Wade H. McCree, Jr., attached as Exhibit 1. Letter dated September 13, 1977, from Frederick L. Ikenson, Special Counsel for Zenith Radio Corporation, attached as Exhibit 2.

2. Under the prior countervailing duty statute, there were no time limits imposed upon action to be taken by the Treasury; and after enactment of the Trade Act of 1974, which became effective on January 3, 1975, U. S. Steel Corporation withdrew the cases which had been pending for seven years with the Treasury because of the fact that all of the countries in Europe had adopted the value-added tax in replacement of their cascade taxes.

the Treasury found that the rebate or remission of the value-added tax did not constitute a bounty or grant within the meaning of our law. On April 14, 1976, U. S. Steel, under the new Trade Act, filed its complaint in the U. S. Customs Court seeking to reverse the Treasury determination; and the case is presently pending in that court.

The effect of the *Zenith* decision will reflect upon the effective enforcement of the countervailing duty statute, both substantively and procedurally. Its determination of the substantive aspects of what constitutes a bounty or grant under our countervailing duty statute will affect American companies manufacturing products which must compete with products exported to this country from all of the nations of the European Community, Sweden, Norway, Brazil, and a number of other nations which engage in rebating taxes upon export, whereas those taxes are imposed upon the same products when sold in their own countries. It is therefore apparent that the *Zenith* decision will have a far reaching effect upon American industry as it competes with imports which have been exempt from taxes in their countries when the products are sold here. The procedural determination of the Court of Customs and Patent Appeals will likewise determine for American manufacturers the scope and content of judicial review which was for the first time spelled out by Congress in passing the Trade Act of 1974. If the decision of the Court of Customs and Patent Appeals is left unresolved, it will, in essence, grant the Secretary of the Treasury unfettered discretion in making his determination as to whether or not there is a bounty or grant under the countervailing duty statute; such a result will effectively negate the judicial review provisions by making them a meaningless exercise in futility.

Interest of the Amicus Curiae.

The interest of the amicus curiae lies in its almost ten years of litigation with the government over the legal question of whether or not the rebate or remission of a so-called "indirect tax" constitutes a bounty or grant under our statute. The crisis in steel trade warrants the Supreme Court of the United States accepting the petition of Zenith so there might be the highest judicial pronouncement defining what is meant by a bounty or grant and to set forth the correct ambit of judicial review so that all industry in this country may be guided as to their rights and remedies from what they perceive to be unfair competition from subsidized imports coming into this country.

The importance of the *Zenith* decision to American trade and trade policy was well stated by the Honorable Russell B. Long, Chairman of the Senate Finance Committee, when he observed:

> "The Customs Court really shocked our trading partners in the world when they held that what these European countries and the Japanese and others were doing by rebating those value-added taxes on things being shipped to us amounts to a bounty that the foreign government is paying on their exports.
>
> "It is the duty of this country, under the law, to levy a countervailing duty of the same amount. Now, that is something that will make it more difficult for them to ship steel and television sets and a whole lot of things into the American market. In my opinion, that decision is right. It has been appealed. I know that all our friends in Europe are upset about it."[3]

3. Transcript of interview of the Honorable Russell B. Long published in the Daily Report for Executives, No. 141, p. J-1 at p. J-2 (July 21, 1977).

Summary of Argument.

SUMMARY OF ARGUMENT

The divided decision of the United States Court of Customs and Patent Appeals is erroneous in having either ignored or nullified previous Supreme Court decisions and in negating the congressionally mandated judicial review provisions so as to reinstate its prior decision which Congress had explicitly overruled by the judicial review provisions of the 1974 Trade Act.

The intermediate appellate court chose to ignore prior Supreme Court decisions which set forth the definition and meaning of "bounty or grant" within the countervailing duty statute. The Court of Customs and Patent Appeals majority stated that the Supreme Court pronouncements were either dicta or were not germane to the problems of trade as they may exist today. The pronouncements of this Court, albeit several decades old, in fact substantively define a bounty or grant as comprehending the rebate or remission of taxes as involved in the *Zenith* decision. Furthermore, even if the clear pronouncements of this Court were in fact dicta, it is not up to the intermediate appellate court to choose to ignore the teaching of the Supreme Court and to come up with a result that is opposed to the judicial interpretations of this Court. The majority opinion of the lower court placed great reliance on long established Treasury practice. Great mischief will arise if the proposition is permitted to stand that the Executive Branch may change the law if its interpretation, contrary to statute and judicial construction, continues for a sufficiently long period of time.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Court Of Customs And Patent Appeals Decision Repudiates Decisions Of The Supreme Court Of The United States

The decisions of this Court have stated the proper criteria from an economic, legal, and eminently pragmatic means of enforcing the countervailing duty statute. It is acknowledged that the Treasury finds a bounty or grant when there is remission or rebate of a so-called "direct tax", whereas it does *not* countervail against the rebate or remission of a so-called "indirect tax". The Treasury Department has found subsidies and imposed the countervailing duty statute on any number of foreign schemes which have had the effect of benefiting an exporter shipping his goods to this country as opposed to selling in his own market. Any direct payment of a bonus to an exporter for shipping his goods abroad, any special government reduction in freight rates for exporters, and any government grants or preferential treatment to exporters which are available only when one exports are benefits conferred that the Treasury would find are grants or bounties within the meaning of our countervailing duty statute. We submit that the "indirect tax" situation is the only circumstance in which the Treasury has carved out this unique exception which has been the subject matter of controversy in international trade negotiations and which now constitutes the subject matter of the *Zenith* decision.[4]

4. And indeed in the U. S. Steel decade of litigation on this issue, this has been the area that has surfaced and provided the problem that is the subject matter of this petition for *certiorari*. In fact, U. S. Steel filed a countervailing duty case, along with other transmission tower manufacturers, charging there were export subsidies by the Italian Government under various of its statutes. The Treasury Department found that a number of the Italian actions dealing with so-called rebates or remissions of direct taxes, as well as other preferential export treatment, constituted a bounty or grant and levied countervailing duties with respect to those items. However, with respect to the question of the rebate or remission of the Italian indirect turnover tax, the Treasury Department made no ruling and in fact has failed to this time to make any ultimate determination of that issue. The decision by Treasury was the subject of judicial review by the importers, which paradoxically enough the Court of Customs and Patent Appeals found to be proper—permitting judicial review by importers but not judicial review by an American manufacturer. See *American Express Co.* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd* 60 C.C.P.A. 86, C.A.D. 1087, 472 F.2d 1050 (1973).

Mr. Chief Justice Fuller observed the wisdom of finding a bounty or grant without regard to the tyranny of labels and is, we submit, the foundation for the correct economic and legal interpretation of our statute. His profound observations occurred in *United States* v. *Passavant*,[5] where the Chief Justice stated in part:

> "Doubtless to encourage exportation and the introduction of German goods into other markets, the German Government could remit or refund the tax, pay a bonus, or allow a drawback.
>
> "And it is found that in respect of these goods when 'purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called "bonification of tax," as distinguished from being refunded as a rebate.' The use of the word 'bonifica-

5. 169 U.S. 16 at 23 (1898).

tion' does not change the character of this remission. It is a special advantage extended by the government in aid of manufacturers and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is 'a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all.' "

This pronouncement of the Chief Justice, we submit, served as the cornerstone for the later pronouncements of this Court as to the proper interpretation of what constitutes a subsidy under the countervailing duty statute. These decisions, going back to the statement of Chief Justice Fuller, represent a sound judicial approach which incorporates eminently valid economics—only the amount of the bounty has economic significance and one must not become bogged down in the nicety of definitional labels which has plagued the Treasury in its narrow exception for the rebate or remission of "indirect taxes". This Court has taught that the only pertinent inquiry is whether or not goods exported to the United States have been relieved of a burden (whether a tax or some other designated label) that would otherwise have been imposed on the sale of goods if sold in the country of exportation. If the goods are exempt from a tax or other burden on export, then there is a bounty or grant in the amount of that rebate or remission.

It is with this beginning that one must read and reference the landmark decision of this Court in the area of countervailing duty jurisprudence that occurred in *Downs* v. *United States*.[6] In *Downs* the Russian Govern-

6. 187 U.S. 496 (1903).

ment resorted to a complex method of subsidizing sugar exports. The scheme involved two export incentives. The first was to relieve exported sugar of an excise tax that otherwise would have been imposed if the product had been sold in Russia. Second, the exporter then received a certificate permitting him to transfer sugar, in the amount exported, from one classification in the domestic market to a more favorable classification; this certificate was a valuable and transferable item. The United States imposed a countervailing duty on Russian sugar imported into this country. On ultimate appeal to the Supreme Court, it was held:

"... [*B*]*ut, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported.* If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; but where, in addition to that, these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation.

* * *

"... If no bounty at all were paid, all sugar, or at least all 'free sugar,' would pay the same tax, whether sold at home or exported abroad; and in

this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 *per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit." [Emphasis added][7]

The reading of the *Downs* decision and this clear and precise language shows that the Supreme Court of the United States was making a substantive determination and not merely engaging in extraneous dicta. Any doubt on this point can be eliminated by reference to the briefs of the parties in submitting the issue to the Supreme Court. From those briefs it is abundantly clear that the parties were arguing to this Court the specific issue involved in the *Zenith* case and the U. S. Steel case pending in the Customs Court; namely, whether or not the rebate or remission of an excise tax (an "indirect tax") constitutes a bounty or grant under our countervailing duty statute. In the briefs it was stipulated by the parties that the export subsidies involved in the *Downs* case were: (a) that the imported sugar would have been subject to an excise tax if sold in Russia but that the sugar exported to the United States was relieved of that excise tax either by way of a refund or a cancellation of indebtedness; (b) that the government issued to the exporter a certificate showing he had exported a quantity of so-called free sugar, and this cer-

---

7. *Downs* v. *United States,* 187 U.S. 496, at 513-515 (1903). The language is so extremely important in perceiving that the method of subsidy is unimportant. The majority in the lower court raised an irrelevancy—the difficulty in ascertaining the economic impact of a tax rebate—and thereby placed themselves at odds with this Court.

tificate had market value, which was transferable. It is quite clear that one of the crucial issues presented to the Supreme Court was whether or not the remission of the excise tax constituted a bounty or grant, and the court unequivocally responded that it did.[8]

The unanimous three-judge decision by the United States Customs Court finding that the rebate or remission of the Japanese commodity tax constituted a subsidy under our countervailing duty statute clearly understood the rationale and teaching of the Supreme Court in the *Passavant* and *Downs* decisions. This reference to Chief Justice Fuller in *Passavant* and the meaning of the landmark decision in *Downs* was particularly highlighted in the opinion written by Judge Newman.[9] Although countervailing duties were not involved in *Passavant,* Chief Justice Fuller's economic analysis of the German tax rebate scheme is illuminating.[10]

Passavant was cited by the Supreme Court in two landmark decisions construing the scope of the 1897 general countervailing duty statute, which is the progenitor of section 303 of the Tariff Act of 1930 (19 U.S.C. §1303), as amended: *Downs* v. *United States,* 187 U.S. 496 (1903); and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). Suffice it to state that the Supreme Court has unequivocally enunciated that the rebate or remission of a tax on exported products, where such taxes have been imposed on a domestic sale in the coun-

---

8. These stipulated facts appear in the opinion of the Supreme Court, 187 U.S. 496 at 511 (1903).

9. 430 F. Supp. 242 at 252 (1977).

10. 169 U.S. 16 at 22-23 (1898).

try of exportation, constitutes a bounty or grant under the countervailing duty statute.

After the *Downs* decision, the countervailing duty statute was periodically reenacted by Congress, but was never amended to except tax remissions from its ambit. Fundamentally, such repeated reenactments without excepting tax remissions is significantly indicative of a congressional intent to approve the judicial construction of the countervailing duty statute.

Some sixteen years after the *Downs* decision, this Court had further occasion to restate its strong views on the breadth and scope of the countervailing duty statute. This judicial pronouncement setting forth the scope and meaning of the statute once again was in the *Nicholas* case.[11] In *Nicholas* the British Government provided an allowance to exporters of gin, and this country imposed a countervailing duty in the amount of such allowance. The Supreme Court upheld the imposition of countervailing duties and provided rather elaborate commentary on the proper meaning and interpretation of our countervailing duty statute. In rejecting certain technical arguments made to this Court, it stated in part:

> ". . . We do not find it necessary to go into such confusing considerations. The question in the case is more direct, and is whether the threepence and fivepence paid on account of export from the United Kingdom is the bestowal 'directly or indirectly' of a 'bounty or grant upon the exportation of any article or merchandise from such country' . . . .

11. 249 U.S. 34 (1919).

"Looking only at the paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or fivepence a gallon, as the case may be, *and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear*. There is a benefit, therefore, in exportation,—an inducement to seek the foreign market. . . .

* * *

". . . Every new statute is individual and presents its own problem. That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose. Whenever any country 'shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise,' there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one 'equal to the net amount of such bounty or grant, however the same be paid or bestowed.' The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—'grant' as well as 'bounty'—must be given effect. If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required. . . .

* * *

"Our conclusion is supported, we think, by *United States* v. *Passavant,* supra, a case from which counsel have adduced some argument. . . .

* * *

"Downs v. United States, 187 U.S. 496, 47 L.ed. 275, 23 Sup. Ct. Rep. 222, is a like example, and direct and indirect bounties are illustrated. As an instance of the former the amount paid upon the production of sugar under the Act of Congress of October 1, 1890 [26 Stat. at L. 567, chap. 1244], is adduced, and also the 'drawback' (the word of the statute is used) upon certain articles exported; *as instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given, and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden.*" [Emphasis added][12]

This expansive interpretation of the countervailing duty statute by the Supreme Court had been urged by the United States in the government brief filed with the court in *Nicholas;* in the government brief it was pointed out that Congress, in using the words "bestow" and "grant", intended to make the statute "broad and all inclusive". And in the U. S. government brief, it rejected the argument of the British that the export allowance was designed only to prevent its producers from being placed at a disadvantage vis-a-vis foreign competitors who did not bear the tax costs imposed on the British spirits; the United States responded that the only proper

12. 249 U.S. 34 at 37-41 (1919).

point of view is from the position of the U. S. as an importing country where the effect of the British allowance is a bounty or grant. Finally, the brief by the United States rejected the argument that inaction by Treasury in imposing countervailing duties precluded enforcement; indeed Treasury practice had apparently countenanced such export rebates by not applying the countervailing duty law to that type of situation. The government brief to this Court pointed out the fundamental legal view:

> "The long-deferred action of the Secretary of the Treasury in ascertaining, determining and declaring the net amount of the bounty or grant paid or bestowed by the Kingdom of Great Britain and Ireland presents no reason why our Government should not now levy and collect the additional duty prescribed by paragraph E, section IV, tariff act of 1913. *The failure of an executive department to enforce a statute does not effect a repeal thereof.*" [Emphasis added][13]

This Court has taught us that the rebate or remission of any tax on products exported, where the taxes would otherwise have been imposed on a domestic sale in the country of exportation, constitutes a bounty or grant subject to the imposition of countervailing duties under our statute. All three judges of the Customs Court in the *Zenith* case and two of the dissenting judges in the Court of Customs and Patent Appeals have so interpreted and followed the teachings and holdings of the Supreme Court of the United States. It is, we sub-

13. Brief of the United States filed with the Supreme Court in the *Nicholas* case, at p. 44; the other references appear at pp. 33 and 35 of the brief.

mit, improper for the three-judge majority of the CCPA to ignore the Supreme Court decisions by denoting them as merely dicta and thereby place their mark of approval upon Treasury Department interpretation that is at variance with Supreme Court holdings. This Court has not had occasion to address itself to this issue since *Nicholas* in 1919, but nonetheless the judicial pronouncements of this Court[14] must remain binding upon the lower federal judiciary, and it is only this Court which may reexamine and overturn its own decisions if it finds that the previous cases were improvidently decided. We urge that this Court find that this issue, in the context of today's world and the confusion created by the majority opinion of the CCPA, warrants the grant of *certiorari* so that the Supreme Court may again afford the necessary clarity and teaching for the enforcement of our countervailing duty statute.

The final point is the need for this Court to deal with the specific uniqueness granted to "indirect taxes" by the Treasury which has found affirmance by the three-judge majority of the CCPA. The Senate Finance Committee Report, which accompanied the Trade Act of 1974, addressed itself to the artificiality of the distinction between direct and indirect taxes and stated in part:

> "(5) The Committee also believes that GATT provisions on tax adjustments in international trade should be revised to assure that they will be trade neutral. Present provisions permit adjustments on traded goods for certain indirect taxes but not for direct taxes. The Committee expects that the President will seek such modification of present rules as

14. Absent Congress changing the law to overturn a Supreme Court decision.

> would remove any disadvantage to countries like the United States relying primarily on direct taxes and put all countries on an equal footing."[15]

B. The Decision Of The CCPA Nullifies The Congressional Judicial Review Provisions Of The Trade Act Of 1974

In 1971 the Court of Customs and Patent Appeals held that an American manufacturer had no right of judicial review from an adverse decision of the Secretary of Treasury finding that there was no bounty or grant under the countervailing duty statute. In *Hammond Lead Products, Inc.* v. *United States,*[16] the United States Customs Court had on appeal by an American manufacturer overruled Treasury and found that certain actions by Mexico on the importation of litharge into this country constituted a subsidy under our statute; as part of that finding it found that the rebate of indirect taxes came within the purview of our statute. On appeal a divided CCPA reversed the Customs Court by finding that although an importer had the right of judicial review from an affirmative decision of the Treasury finding a bounty or grant an American manufacturer was not entitled to judicial review.[17] The CCPA held that the countervailing duty statute was a penalty and that the Secretary of the Treasury had the unfettered discre-

15. S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. 84 (1974).

16. 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969), *rev'd,* 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied,* 404 U.S. 1005 (1971).

17. 58 C.C.P.A. 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied,* 404 U.S. 1005 (1971).

tion whether or not to impose a penalty; and therefore, it was beyond the purview of judicial review on the matter of whether or not the Secretary should have in fact imposed a countervailing duty.

Congress in enacting the Trade Act of 1974 found the decision of the Court of Customs and Patent Appeals in *Hammond Lead Products* to be out of consonance with basic principles of fairness and equity in depriving an American manufacturer of a right of judicial review which the court had held existed for importers.[18] The House Report accompanying this provision stated the purpose of Congress in providing for the judicial review provisions:

> "Section 331(b) of the bill would amend subsections (a), (b), and (c) of section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), to provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury. The amendment is necessitated by a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*, 58 C.C.P.A. 129, C.A.D. 1017), which held that judicial review of negative countervailing duty determinations was not available to domestic producers. Your committee is concerned that this decision might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law, and believes that the amendment is also warranted, equitably, because American producers have a right to judicial review in the customs courts of other customs determinations involving duty assessments, and importers are entitled to judicial review of the actual assessment of countervailing duties."[19]

The Senate Report accompanying the amendments to the countervailing duty statute observed the *mandatory* nature of the countervailing duty statute and pointed out that for the first time the Secretary of the Treasury was required to act upon complaints within a specified period of time.[20] Despite these explicitly conceived and directed congressional mandates: (1) overruling

---

18. Section 331 of the Trade Act of 1974 made amendments to §§ 303 and 516 of the Tariff Act of 1930, which resulted in the right of judicial review for an American manufacturer from an adverse decision by the Treasury Department. The appeal of United States Steel Corporation from the adverse ruling of the Treasury decision on the rebate or remission of the value-added tax from Europe constituted the first case taken by an American manufacturer under that provision; the *Zenith* decision was the second appeal taken by an American manufacturer, but is the *first* case that has come before the CCPA involving the judicial review provisions since its enactment in the Trade Act of 1974.

19. H.R. Rep. No. 93-571 (Committee on Ways and Means), 93d Congress, 1st Sess. 76 (1973).

20. "Section 331 of the bill would amend the present countervailing duty law. In the past, the administration of the countervailing duty law has been subject to considerable criticism. Although the present statute is, by its terms, mandatory, there is no period stipulated within which the Secretary of the Treasury must make his determination as to whether or not a bounty or grant exists. The Committee has been concerned over the past years that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law. . . ." S. Rep. No. 93-1298 (Committee on Finance), 93d Congress, 2d Sess. 183 (1974).

the *Hammond Lead Products* decision of the Court of Customs and Patent Appeals and specifying the right of judicial review for an American manufacturer, (2) specifying time limits in which the Secretary must act, and (3) reaffirming the mandatory obligation of the Secretary to administer the countervailing duty law, the CCPA in *Zenith* effectively overruled the congressional amendments and returned the law to the same state that it was in after that court had decided the *Hammond Lead Products* case. This result is inherent in the finding by the majority, which stated as follows:

> "The intent of Congress, as expressed in §303 itself, is not difficult to fathom. . . . Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words 'bounty,' 'grant,' or 'net amount,' in the statute or anywhere else, for almost 80 years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.
>
> * * *
>
> "Since 1898, the Treasury Department has consistently and uniformly interpreted §303 as requiring that there be an 'excessive' remission of an excise tax, i.e., the governmental giving of something above and beyond mere excise tax remission, to have a bounty or grant. Conversely, it has consistently and uniformly for now almost 79 years, interpreted §303 as not requiring that the mere remission of an excise tax, i.e., a 'non-excessive' remission of the type now before us, be deemed a bounty or grant."[21]

If there is to be any meaningful implementation given to the judicial review provisions of the Trade Act of 1974, we urge that this Court review the decision of the CCPA in *Zenith* to provide a rational approach to the statutory amendment consistent with its language and the spirit and intent of Congress in enacting it.

The Treasury Department lobbied very hard in the congressional consideration of the Trade Act of 1974 and urged Congress to sustain the *Hammond Lead* decision by continuing to make Treasury's negative determinations nonreviewable. In doing so Treasury adopted the reasoning of the Court of Customs and Patent Appeals decision in *Hammond Lead Products,* which had found that Congress did not want negative decisions reviewed because they presented difficult international trading problems and consequently it was best to leave unreviewable discretion in the Secretary. Congress rejected this plea of the Treasury and adopted the judicial review provisions, maintaining the mandatory nature of the statute and adding specific time limits in which a decision must be made.[22]

In spite of the clear language of Congress in explicitly overruling the *Hammond Lead Products* decision and providing an American manufacturer with judicial

---

21. C.A.D. 1195 at 13-14 and 20-21 (1977).

22. See Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Congress, 1st Sess. 254 (1973).

review—which evidenced a strong congressional desire to provide equity and parity to the American manufacturer to be able to obtain judicial review of Treasury decisions—the Court of Customs and Patent Appeals misread or misunderstood the entire purpose and again retreated to its escape approach in *Hammond Lead Products,* which refers to the Secretary of the Treasury's unfettered discretion. And the effect of *Zenith* is to thwart an aggrieved American manufacturer from obtaining meaningful judicial review of a negative decision by the Treasury on any claim of import subsidies. A further inequity results by apparently restoring the preferred position of the importer, who presumably under the cloudy decision of the majority opinion in *Zenith* will be able to have judicial review from an affirmative decision that has effectively been precluded to an American manufacturer of a negative Treasury decision.

Judge Miller in his dissent in the *Zenith* decision pointed out the fact that Congress had overruled that court in the *Hammond Lead Products* case and that it had gone to great lengths to provide meaningful review which was being emasculated by the majority opinion.[23]

---

23. ". . . With respect to what has occurred since 1973, provision in the Trade Act of 1974 for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise reflects, as shown *infra* note 26, expressed *Congressional concern* over 'inaction or insufficient action, or . . . excessive delay in the administrative process.'

"That provision was enacted in response to the majority opinion of this court in *United States v. Hammond Lead Products, Inc., supra* note 3. . . .

* * *

Indeed the majority view in *Zenith,* which upheld the long-standing Treasury practice of carving out for special treatment the rebate or remission of indirect taxes caused the unanimous Customs Court to comment on that facet, as evidenced by Judge Boe's decision:

> "If, as the defendant contends, a longstanding administrative interpretation of the countervailing duty statute should alone dictate the presently accepted legal construction thereof, then, indeed, judicial review becomes a mockery."[24]

"On appeal, this court, split 3-2, held that the Customs Court lacked jurisdiction. . . .

* * *

"The response of Congress was to include in the Trade Act of 1974 an amendment to section 516 which, as noted above, provides for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise. . . ."

C.A.D. 1195 at 36, 38, and 40 (1977).

24. 430 F. Supp. 242 at 262-263 (1977).

CONCLUSION

In order to provide an acceptable interpretation of this Court's own decisions, it is submitted that the petition for *certiorari* by Zenith should be granted. The fact that five judges have found that this Court's opinions in *Downs, Nicholas,* and *Passavant* were substantive and clear that the rebate or remission of an indirect tax constituted a bounty or grant, whereas three judges of the CCPA found to the contrary, shows the need for the Supreme Court to address itself to these topical and most important issues affecting American manufacturers and international trade. There is now an inevitable confusion in the administration of the statute; and if the *Zenith* decision is left as it presently stands, the American manufacturer will effectively have been precluded from judicial review to correct any perceived wrongs which it may believe have occurred as a result of a negative decision by the Treasury Department. We submit that it is time for the Supreme Court to take up the *Zenith* decision and clarify these important issues.

Respectfully submitted,

D. B. KING
J. J. MANGAN

By .....
D. B. King

Attorneys for United States
Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dated: October 14, 1977

EXHIBIT 1

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530
August 25, 1977

D. B. King, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Re: Zenith Radio Corporation v.
United States, No. 77-19 (C.C.P.A.)

Dear Mr. King:

I hereby consent to the filing of a brief *amicus curiae* on behalf of the United States Steel Corporation in this case in the Supreme Court, in the event that a petition for a writ of certiorari is filed.

Sincerely,

WADE H. MCCREE, JR.
Solicitor General

Exhibit 2.

EXHIBIT 2

STEWART & IKENSON
ATTORNEYS AT LAW
1001 Connecticut Avenue
Washington, D.C. 20036
EUGENE L. STEWART
FREDERICK L. IKENSON
TELEPHONE
(202) 785-4185
TELEX 89-533

September 13, 1977

D. B. King, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dear Mr. King:

Re: Zenith Radio Corporation v.
United States, No. 77-19 (C.C.P.A.)

Please be advised that Zenith Radio Corporation consents to the filing of a brief *amicus curiae* on behalf of United States Steel Corporation in this case in the Supreme Court, once Zenith's petition for a writ of certiorari is filed.

Very truly yours,

FREDERICK L. IKENSON
Special Counsel for
Zenith Radio Corporation

Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AS AMICUS CURIAE IN SUPPORT OF THE ZENITH RADIO CORPORATION PETITION FOR CERTIORARI

THOMAS F. SHANNON
DONALD E. DEKIEFFER
DAVID A. HARTQUIST
LAUREN R. OLDAK

Attorneys for Amicus Curiae
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Of Counsel:

COLLIER, SHANNON, RILL, EDWARDS & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. Resolution of the Countervailability of Indirect Taxes Is Critically Important to American Industries Suffering From Such Unfair Import Competition	6
II. The Court of Customs and Patent Appeals Abdicated Its Judicial Responsibilities in the *Zenith* Case and Denied Meaningful Judicial Review	10
CONCLUSION	17

CITATIONS

CASES CITED:

1. Downs v. United States, 187 U.S. 496 (1903) 4
2. Hammond Lead Products, Inc. v. United States, 440 F.2d 1024 (C.C.P.A. 1971) 12, 13
3. Nicholas and Co. v. United States, 249 U.S. 34 (1919) 4, 5

FEDERAL STATUTES CITED:

1. 19 U.S.C.A. § 160 (Supp. 1976) 11
2. 19 U.S.C.A. § 1303 (Supp. 1977) 4, 8
3. 19 U.S.C.A. § 1337 (b)(1) (Supp. 1977) 11
4. 19 U.S.C.A. § 1516 (a) (Supp. 1977) 13
5. 19 U.S.C.A. § 1516 (d) (Supp. 1977) 4
6. 19 U.S.C.A. § 2102 (4) (Supp. 1977) 10
7. 19 U.S.C.A. § 2251 (a)(1) (Supp. 1977) 7
8. 19 U.S.C.A. § 2253 (h) (Supp. 1977) 8

Page

OTHER AUTHORITIES:

1. 41 Fed. Reg. 1298 (1976) 4
2. 4 Law and Pol. Int'l Bus. 146 (1972) 13
3. S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) ...10, 11, 12, 13
4. Note, 7 Tex. Int'l L. J. 272 (1972) 13
5. TC Pub. 436, "Television Receivers and Certain Parts Thereof" (Nov. 1971) 9
6. United States Industrial Outlook 1977, "Electronic Equipment and Components" ch. 31, 1977 6
7. U.S. I.T.C. Pub. 808, "Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof," (Mar. 1977) 7
8. Note, 12 Va. J. Int'l L. 277 (1972) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AS AMICUS CURIAE IN SUPPORT OF THE ZENITH RADIO CORPORATION PETITION FOR CERTIORARI

The Committee to Preserve American Color Television hereby respectfully requests as amicus curiae that the United States Supreme Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Customs and Patent Appeals in *United States* v. *Zenith Radio Corp.,* Customs Appeal No. 77-19 (July 28, 1977), reported on page 6 of the Customs Bulletin and Decisions of August 17, 1977.

INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION

The Committee to Preserve American Color Television (hereinafter "COMPACT") is an unincorporated association comprised of industry and labor organizations created to seek, primarily through legal action under the Trade Act of 1974, an end to the flood of Japanese color televisions now being imported into the United States. COMPACT filed a petition for import relief with the United States International Trade Commission on September 22, 1976, which lead to the successful negotiation of an orderly marketing agreement between the United States and Japan limiting the number of color televisions that can be imported from Japan during the next three years.

The industry members of COMPACT include: Corning Glass Works and Owens-Illinois, Inc., two major suppliers of glass for television picture tubes; and Wells-Gardner Electronics Corporation, a manufacturer of private label television sets for retailers.

The labor members of COMPACT include: the Allied Industrial Workers of America International Union (AIW), the American Flint Glass Workers Union of North America (AFGW), the Communications Workers of America (CWA), the Glass Bottle Blowers' Association of the United States and Canada (GBBA), the Independent Radionic Workers of America (IRWA), the International Association of Machinists (IAM), the International Brotherhood of Electrical Workers (IBEW), the International Union of Electrical, Radio and Machine Workers (IUE), the United Furniture Workers of America (UFWA),

and the United Steelworkers of America (USW). The Industrial Union Department of the AFL-CIO, a trade union organization which provides services to affiliated unions and their members is also a COMPACT member. All of the labor union members of COMPACT, with the exception of the Independent Radionic Workers of America, are members of the AFL-CIO.

The labor union members of COMPACT represent workers who are or were employed by all of the current United States television manufacturers and many of the companies which manufacture components incorporated into television sets. The IRWA, the IAM, the IUE and the IBEW represent Zenith workers at four plants located respectively in Chicago and Melrose Park, Illinois, Evansville, Indiana, and Springfield, Missouri. Although these four unions have a direct interest in this action, COMPACT's other members' interest is equally significant since the outcome of this litigation will not only affect Zenith and its workers but the entire domestic consumer electronics industry. As will be developed later in this brief, the future of this once healthy industry is in jeopardy and is dependent on the decision in this case.

STATEMENT OF THE CASE

Zenith Radio Corporation (hereinafter "Zenith") filed a petition with the Commissioner of Customs on April 3, 1970, seeking the assessment of countervailing duties on television and other consumer electronics products being imported from Japan. The petition asserted that the Japanese tax system which exempts exports from a commodity tax conferred a "bounty or grant" within the meaning of the countervailing duty

statute. Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1303 (Supp. 1977). After six years of inaction and only after Congress amended the countervailing duty statute requiring a decision to be published, did the Secretary of the Treasury decide that "no bounty or grant is being paid. . . ." 41 *Fed. Reg.* 1298 (1976).

Zenith filed suit in the Customs Court to challenge this determination pursuant to the recently amended section 516 of the Tariff Act of 1930. 19 U.S.C.A. § 1516(d) (Supp. 1977). The Customs Court unanimously held the Japanese scheme of exempting exports from the commodity tax was, as a matter of law, a "bounty or grant" under the provisions of 19 U.S.C.A. § 1303 (Supp. 1977) and that countervailing duties must be assessed against exports benefiting from the exemption. *Zenith Radio Corp.* v. *United States,* 430 F. Supp. 242, 78 Cust. Ct. , (1977).

On April 15, 1977, the United States filed an appeal with the Court of Customs and Patent Appeals which reversed the judgment of the Customs Court in a three to two decision. *United States* v. *Zenith Radio Corp.*, F.2d , 64 CCPA , Customs Appeal No. 77-19 (July 28, 1977). Chief Judge Markey stated that the decisions of this Court in *Downs* v. *United States,* 187 U.S. 496 (1903) and *Nicholas and Co.* v. *United States,* 249 U.S. 34 (1919) relied on by the court below, were not dispositive of the issue because the relevant language was dicta. *Id.* at 10-11. The decision looked to the Treasury Department's established practice of not countervailing against tax exemptions like those of the Japanese and found Congressional acquiescence to this

practice. *Id.* at 24. Further, the opinion concluded that every decision as to whether a particular practice confers a bounty or grant is essentially a factual/economic one and cannot be resolved by courts "woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred. . . ." *Id.* at 14.

Judge Miller, with Judge Baldwin concurring, dissented. Judge Miller found *Downs* to be controlling notwithstanding the administrative practice, determined there was no congressional acceptance of the Treasury practice and pointed out that the underlying issue in the case is one of law, not of fact.

REASONS FOR GRANTING THE WRIT

This case will have a substantial economic impact on Zenith Radio Corporation, COMPACT's members and the remaining segments of the domestic consumer electronics industry. However, the importance of the issues raised extends far beyond the immediate factual situation at bar, broadly affecting the ability of import-sensitive domestic industries to survive unfair competition from foreign producers and the interaction between Congress, the judiciary and the Executive Branch.

This brief will focus on two issues. First, many industries including the domestic consumer electronics industry have suffered from the injury inflicted by foreign producers subsidized by their governments. It is therefore critical that this Court resolve the issue of whether indirect taxes are bounties or grants within the meaning of the countervailing duty statute since Japan, Europe and other major suppliers of the U.S.

market engage in such export subsidies on a broad range of products.

Second, if the Court of Customs and Patent Appeals' ruling is upheld, American manufacturers will be denied their right to judicial review because the appellate court has given unwarranted discretion to the Executive Branch in determining the scope of the countervailing duty statute and has abdicated the responsibility expressly mandated by Congress to interpret the statute according to Congressional intent.

I. Resolution of the Countervailability of Indirect Taxes Is Critically Important to American Industries Suffering From Such Unfair Import Competition

Judicial interpretation of the scope of the countervailing duty statute as it applies to remission of indirect taxes such as the Japanese commodity tax is urgently needed by import-sensitive industries whose survival is jeopardized by the continuation of these unfair trade practices.

That the American consumer electronics industry has been severely injured by the aggressive assault of low-priced imports has been demonstrated by the seriatim loss of these markets in recent years. Virtually all of the radios and tape recorders sold in this country last year were produced abroad. In addition, imports captured 65 percent of the phonograph and hi-fi component market and more than 70 percent of the black and white television set market by 1976. U.S. Industrial Outlook 1977, "Electronic Equipment and Components" ch. 31, 1977. When imports increased their share of color television consumption from 18 percent to 36.5 percent in a brief 12-month period, it became clear that

this last remaining segment of the U.S. consumer electronics industry was also targeted for the destruction inflicted on other electronic products. U.S.I.T.C. Pub. 808, "Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof" A-90 (Mar. 1977).

To forestall this fate, the Committee to Preserve American Color Television filed a petition for import relief pursuant to section 201 of the Trade Act of 1974, 19 U.S.C.A. § 2251(a)(1) (Supp. 1977), in September, 1976. After a comprehensive six-month investigation, the U.S. International Trade Commission unanimously determined that imports had seriously injured the domestic color television industry. U.S.I.T.C. Pub. 808, "Televisi n Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof" (Mar. 1977).

The ITC's conclusions were supported by alarming facts. In the one-year period between 1975 and 1976, import penetration increased dramatically to almost 40 percent of the U.S. market, threatening the survival of this industry which had seen the number of American manufacturers of television sets decline from 27 to 12 between 1960 and 1976. *Id.* at A-8. The industry's profits were a meager 4.3 percent before taxes last year (*Id.* at A-123) and the number of workers declined by 35 percent in the past five years, which meant that almost 13,000 workers in this industry had lost their jobs as a result of the relentless onslaught of imports. *Id.* at A-117.

Although the President agreed with the International Trade Commission's findings and negotiated an orderly marketing agreement with Japan to restrain

the number of color television sets entering the United States in the next three years, such import relief necessarily treats only the symptoms, rather than the underlying causes of the successful market penetration by foreign producers. By design, section 201 of the Trade Act of 1974 does not require a determination of unfair trade practices nor is the relief under its provisions available for more than a temporary period. 19 U.S.C.A. § 2253(h) (Supp. 1977).

By contrast, the countervailing duty statute is expressly fashioned to deal with the competitive advantage given foreign producers when governments subsidize their operations. 19 U.S.C.A. § 1303 (Supp. 1977). Whenever it is determined that a bounty or grant has been bestowed and for as long as such subsidies continue, duties equal to the extent of the subsidy must be imposed by the U.S. government to protect U.S. industries confronted with this type of unfair competition.

Thus, the issue of whether commodity tax rebates are bounties or grants within the meaning of the countervailing duty statute as asserted by the Zenith Radio Corporation in its complaint to the Department of the Treasury is of critical importance to companies and workers represented by the Committee to Preserve American Color Television. Although the injury suffered by the American television industry is not entirely attributable to the Japanese practice of remitting their commodity tax on exports, the 12 to 15 percent reduction in the price of such goods resulting from the 15 to 20 percent rebate contributes to the Japanese ability to undersell their American competitors. In fact, the International Trade Commission determined in the

1971 television escape clause case that government subsidies gave foreign producers an unfair advantage in the U.S. market. TC Pub. 436, "Television Receivers and Certain Parts Thereof" 6 (Nov. 1971).

Thus, a final determination that remission of commodity taxes are countervailable and the imposition of a countervailing duty on these products will deal with the fundamental problem facing the domestic television industry—that it is forced to compete with foreign producers subsidized by their governments. Moreover, it is not only American television manufacturers who will benefit from such a result. The outcome of this litigation will affect the fates of a broad range of import-sensitive American industries because the Japanese remit commodity taxes on numerous products when such articles are destined for export markets.

In addition, the commodity tax is just one of several indirect taxes which the Department of Treasury has persistently refused to find subject to the countervailing duty laws. The resolution of whether rebate of this indirect tax is a bounty or grant within the meaning of section 303 of the Tariff Act of 1930 will establish clear precedent for determinations involving other indirect tax remissions, such as the value-added taxes rebated on steel exports from Europe.

Since indirect taxes such as the commodity tax and the value-added tax are common export-promotion devices used by Japan and Europe and since remissions of these taxes affect a broad variety of products exported to the United States, a determination of the scope of the U.S. countervailing duty laws will have a significant and far-ranging effect on the ability of American industries such as the U.S. color television

industry to compete with unfair competition from abroad—and ultimately to survive such competition.

II. The Court of Customs and Patent Appeals Abdicated Its Judicial Responsibilities in the *Zenith* Case and Denied Meaningful Judicial Review

Although Congress expressly criticized the Executive Branch's handling of foreign unfair trade practices and specifically reversed the Court of Customs and Patent Appeals' denial of judicial review to domestic manufacturers in countervailing duty cases, the court in the instant case has effectively thwarted the Congressional mandate to review negative Treasury determinations when the scope of the countervailing duty statute is at issue.

As indicated in the statement of purposes of the Trade Act of 1974, one of the primary objectives of this legislation was "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition. . . ." 19 U.S.C.A. § 2102(4) (Supp. 1977). The Senate Finance Committee sharply chastised "the Executive's unwillingness to enforce U.S. trade statutes in response to foreign unfair trade practices" and accused the Administration of "actually foster[ing] the proliferation of barriers to international commerce" because it pursued "a soft trade policy" and refused "to strike swiftly and surely at foreign unfair trade practices." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 11 (1974). In the view of the Committee, "the United States can no longer afford to stand by and expose its markets, while other nations shelter their economies . . . with export subsidies . . . and a host of other practices which effectively discriminate against U.S. trade and production." *Id.* at 19.

Congress thus took steps to compel expeditious and effective action against the illegal trading practices of foreign producers. It granted express authority to retaliate against unjustifiable and unreasonable trade barriers in section 301 of the Trade Act which the Senate Finance Committee urged should not be "a dead letter" because "[f]oreign trading partners should know that we are willing to do business with them on a fair and free basis, but if they insist on maintaining unfair advantages, swift and certain retaliation against their commerce will occur." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 164 (1974). In addition, Congress imposed firm statutory deadlines for antidumping actions, 19 U.S.C.A. § 160 (Supp. 1976), and actions against unfair methods of competition filed pursuant to section 337 of the Trade Act. 19 U.S.C.A. § 1337(b)(1) (Supp. 1977).

But perhaps most pertinently, Congress was determined to reinvigorate the countervailing duty statute and ensure that American industries were not placed at a competitive disadvantage because of subsidies provided by foreign governments. As noted by the Senate Finance Committee Report, "the administration of the countervailing duty law has been subject to considerable criticism," S. Rep. No. 93-1298, 93d Cong., 2d Sess. 183 (1974), stating:

> Although the present statute is, by its terms, mandatory, there is no period stipulated within which the Secretary of the Treasury must make his determination as to whether or not a bounty or grant exists. The Committee has been concerned over the past years that the Treasury Department has used

> the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law. *Id.*

Therefore, "[i]n order to assure that the interests of American producers will be protected from the adverse effect of trade-distorting foreign export subsidies," Congress "restructured" the administration of the countervailing duty statute, providing mandatory deadlines, publication of preliminary and final determinations and most significantly the express right to judicial review of negative decisions. *Id.*

Yet, the Court of Customs and Patent Appeals, in denying the countervailability of the commodity tax remissions in the *Zenith* case, undermines the Congressional intent evidenced in the Trade Act of 1974 to compel a more aggressive policy toward foreign government subsidization and, in yielding to the Executive Branch, displays the oversensitivity to political considerations which Congress hoped to eliminate in these cases. In abdicating the judicial responsibilities imposed by the Congress, the appellate court effectively denied American manufacturers their right to judicial review.

The history of this particular provision clearly bears this out. Prior to the enactment of the Trade Act of 1974, an American manufacturer sought judicial review of a negative Treasury determination concerning the exemption of one type of lead product from an export tax applied to other lead product exports from Mexico. In *Hammond Lead Products, Inc.* v. *United States*, 440 F. 2d 1024 (C.C.P.A. 1971), the Court of Customs and Patent Appeals held that domestic pro-

ducers did not have a right to seek judicial review of Treasury countervailing duty determinations and that such decisions were exclusively committed to the discretion of the Secretary.

The court justified its conclusion by stating that Congress had "elect[ed] to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries." *Id.* at 1031. However, perhaps more truthfully, the Court admitted that it was loathe to tackle the complex economic issues involved, acknowledging that "the question whether an indirect bounty or grant is paid does not lend itself to legal answer without the help of other disciplines." *Id.* Thus, the court decided that the imposition of countervailing duties must be left to the "expertise" of the executive to make what the court perceived as "decisions, not necessarily partisan political, but political in a broad sense. . . ." *Id.*

The *Hammond Lead* decision was promptly and vigorously criticized. E.g., 4 Law and Pol. Int'l Bus. 146 (1972); Note, 12 Va. J. Int'l L. 277 (1972); and Note, 7 Tex. Int'l L. J. 272 (1972). Congress took action in the Trade Act of 1974 to overrule the result. Section 516 of the Tariff Act of 1930, 19 U.S.C.A. § 1516(a) (Supp. 1977), was expressly amended to provide American manufacturers the right to challenge Treasury decisions which found foreign government practices not to be bounties or grants within the meaning of the countervailing duty statute. As the Senate Finance Committee Report put it, the amendment was needed "so as to assure effective protection under the countervailing duty laws to American producers. . . ." S. Rep. 93-1298, 93d Cong., 2d Sess. 185 (1974).

Yet, the court in the *Zenith* case has effectively denied the reviewability expressly mandated by Congress. Although granting subject matter jurisdiction, the court avoided its judicial responsibility to interpret the law according to Congressional intent and to scrutinize whether the agency had a rational basis for its determination.

Thus, the court did not even review the record to determine if there was any evidence to support Treasury's administrative practice of finding the remission of indirect taxes not subject to the countervailing duty laws. Convinced that "the economic result of the foreign government's action . . . controls whether or not a bounty or grant has been conferred," *United States v. Zenith Radio Corp.*, F.2d , 64 CCPA , Customs Appeal No. 77-19, 14 (July 28, 1977), the court then acknowledged that the "language of § 303 . . . requires a factual inquiry" (*Id.*) but laments the fact that courts "are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action." *Id.*

Apparently overwhelmed by the prospect of such a task, the court then pointed out that "the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax." *Id.* at 15. Finding that to be a virtue in the instant case, the court concluded that "[t]he Secretary has presumably determined that the economic result here is not the conferring of such a benefit. . . ." *Id.* The court then declared that the "factual underpinnings of the Secretary's negative countervailing duty determination in

this case are not under attack" and that the sole question is "whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law." *Id.*

Thus, the court does not merely defer to ostensible administrative expertise, it eagerly surrenders to it. Although other courts routinely deal with complicated factual matters and, in instances where administrative records are subject to review, require administrative agencies to have a rational basis for their decisions, the Court of Customs and Patent Appeals in the case at bar does not even require evidence in the record, much less evidence that shows some reasonable support for the agency's conclusions. In so doing, the court refuses to do precisely what Congress in the Trade Act of 1974 mandated it should do: review the facts where government subsidization is alleged and determine whether such a situation was intended by Congress to fall within the scope of the countervailing duty statute.

Instead, the CCPA avoids its judicial functions and leaves the final determination to the Department of the Treasury, thereby permitting the Executive Branch to be the ultimate arbiter of the scope of the countervailing duty statute. In the words of the court: "Until lawfully changed, the administrative practice of the Treasury Department, in uniformly considering a non-excessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303." *Id.* at 32.

Such a conclusion is more readily understood when it is noted that the court views the countervailing duty statute as a foreign policy or political tool and not primarily an economic weapon designed to protect Ameri-

can industry from unfair import competition. In perhaps its most revealing statement, the court points out that "[s]uch assessment [of countervailing duties] is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage." *Id.* at 17.

By such a posture, the Congressional mandate to provide meaningful judicial review to American manufacturers who receive negative decisions from the Department of Treasury is rendered completely ineffectual. Although now given standing to sue, domestic companies are in reality denied their day in court if an administrative agency is allowed to interpret the law without accountability. The Court of Customs and Patent Appeals has thereby left American industries virtually remediless against foreign export subsidies which the Executive Branch, rather than Congress, has chosen to treat as not countervailable.

CONCLUSION

For these reasons, the Committee to Preserve American Color Television as amicus curiae respectfully urges the Supreme Court to grant Zenith Radio Corporation's petition for certiorari.

Respectfully submitted,

THOMAS F. SHANNON
DONALD E. DEKIEFFER
DAVID A. HARTQUIST
LAUREN R. OLDAK

Attorneys for Amicus Curiae
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Of Counsel:

COLLIER, SHANNON, RILL, EDWARDS & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
202-337-6000

Oct. 13, 1977

Supreme Court, U. S.
FILED
OCT 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE

EDWIN P. ROME,
Attorney for Amicus Curiae.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY
Four Penn Center Plaza
Philadelphia, Pa. 19103
(215) 569-3700

CURTIS H. BARNETTE
ROGER W. ROBINSON
Martin Tower 2000
Bethlehem, Pa. 18016
(215) 694-6137

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1977

—

No. 77-539

—

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

—

BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE

QUESTION PRESENTED

Section 303(a) of the Tariff Act of 1930, as amended, 19 U. S. C. § 1303, requires that the United States levy a duty upon imported articles whose manufacture, production, or export is subsidized by a bounty or grant bestowed by or in the country of origin. The amount of the duty is equal to the net amount of the bounty or grant. The question presented is whether Section 303(a) requires the exaction of a countervailing duty upon imported articles that are not subject to an otherwise-applicable tax in their country of origin because they are shipped for export.

INTEREST OF BETHLEHEM STEEL CORPORATION [1]

Bethlehem Steel Corporation is an integrated steel producer engaged in the manufacture, fabrication, and sale of steel and steel products. It is the second largest producer of steel in the United States. Principal markets of Bethlehem for steel products are the construction, transportation, service center, processor, and other markets. Bethlehem distributes steel products principally through its own sales organization, which has sales offices, mill depots, or supply stores in more than 80 locations in the United States. It sells significant amounts of steel products to jobbers, dealers, and steel service centers.

Bethlehem competes in the sale of steel and steel products within the United States against foreign steel producers and importers of foreign steel. Since 1960, foreign steel production capacity and foreign steel production have increased dramatically in comparison with increases in domestic steel production capacity and production. Steel production capacity of the countries of the European Economic Community increased from 119 million tons in 1960 to 219 million tons in 1976, and actual steel production increased from 107 million tons to 147 million tons in the same period. In 1976, these European steel producers exported to the United States about three million tons of finished and semi-finished steel products. In 1977, United States imports of steel and steel products from these European countries increased each quarter, rising to an annual rate of about eight million tons during July and August and accounting for approximately 7.5% of total domestic consumption of these products.

1. Pursuant to Rule 42(1) of the rules of this Court, consent to file this brief *amicus curiae* has been obtained from the Solicitor General and from Zenith Radio Corporation.

Bethlehem, along with the other domestic United States steel producers, has long competed with steel imports from European countries which are subsidized and protected by the governments of the producing nations. One domestic producer, United States Steel Corporation, has commenced litigation to challenge the forgiveness of value-added taxes on exports of steel from several European countries. This abatement of value-added taxes is analogous to the forgiveness by the Japanese government of the excise tax on Japanese exports of consumer electronic products, the subject of the petition for writ of certiorari by Zenith Radio Corporation in support of which this brief is filed.

The basic question posed by this case is of the deepest concern to Bethlehem and the entire domestic steel industry. Bethlehem is likely to sustain substantial long-term harm if the decision of the court below is allowed to stand.

DISCUSSION

The Court of Customs and Patent Appeals' *Zenith* decision (Appendix C to Petition for a Writ of Certiorari) brings to mind Mr. Justice Holmes' famous remarks from his dissent in *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 400-401 (1904):

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have

to do in this case is to find the meaning of some not very difficult words."

The settled principles of law which should have compelled affirmance of the Customs Court's decision (Appendix A to the Petition for a Writ of Certiorari) abounded in this case. However, the majority of the Court of Customs and Patent Appeals undoubtedly preceived a Government victory as being politically expedient,[2] which somehow permitted it (1) to *avoid* this Court's holding in *Downs* v. *U. S.*,[3] 187 U. S. 496 (1903), that tax remissions on exports are bounties or grants, (2) to *ignore* this Court's teaching in *Nicholas & Co.* v. *U. S.*, 249 U. S. 234 (1919), that Congress wished to speak in as broad terms as possible in dealing with bounties or grants, in order to capture and offset all possible benefits conferred on exportation, and (3) to *contravene* Congress' clear overruling of the Court of Customs and Patent Appeals' decision in *United States* v. *Hammond Lead Products, Inc.*, 440 F. 2d 1024 (C. C. P. A.), *cert. denied*, 404 U. S. 1005 (1971), and

2. Note, however, the remarks of the Honorable Russell B. Long, Chairman of the Senate Finance Committee, made during a radio interview one week before the Court of Customs and Patent Appeals' *Zenith* decision (printed in the Daily Report for Executives, No. 141, Pages J-1 and J-2 (July 21, 1977)), and quoted in the *amicus curiae* brief of United States Steel Corporation at p. 4. In addition, Senator Long said:

> "The Japanese are upset about it and want to do something about it immediately. The case should be heard by the higher courts and it will appealed no matter how it is decided in the court now. It will be appealed beyond that. It will eventually find its way to the Supreme Court—the sooner the better. Frankly, I think that the Court, if it does its duty, will be required to sustain that decision. The effect of it will be that the United States will be in a far better negotiating position on these trade negotiations in Geneva."

3. Judge Miller's powerful dissent in *Zenith* explodes the majority's efforts to relegate this Court's holding in *Downs* to mere *obiter*. (Appendix C to the Petition for a Writ of Certiorari, pages 89a-99a).

to find that the Secretary of the Treasury had the discretion not to countervail bounties and grants if he so chose.

We will not burden this Court with a reiteration of the strong arguments of Zenith and the other two *amici curiae* in support of the granting of the petition. Suffice it to say that we agree with their arguments and we respectfully join in their prayer that a writ of certiorari be issued.

CONCLUSION

For the reasons stated herein, in the petition, and in the *amicus curiae* briefs of the Committee to Preserve American Color Television and United States Steel Corporation, the petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWIN P. ROME,
Attorney for Amicus Curiae.

BLANK, ROME, KLAUS & COMISKY
Four Penn Center Plaza
Philadelphia, Pa. 19103

CURTIS H. BARNETTE
ROGER W. ROBINSON
Martin Tower 2000
Bethlehem, Pa. 18016

OCTOBER 1977.

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED OCTOBER 11, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

INDEX

	Page
Relevant Docket Entries [United States Customs Court]	1
Relevant Docket Entries [United States Court of Customs and Patent Appeals]	4
Summons	6
Complaint [with exhibits]	8
Defendant's Answer	30
Plaintiff's Motion for Summary Judgment	33
Plaintiff's Statement Pursuant to Rule 8.2(b)	34
[Plaintiff's Proposed] Order and Judgment	38
Defendant's Cross-Motion for Summary Judgment	40
Defendant's Statement of Material Facts	41
[Defendant's Proposed] Order	43
Exhibit A to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment	44
Exhibit C to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment	49
Plaintiff's Exhibit 2 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment	52

Page

Plaintiff's Exhibit 4 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 78

Plaintiff's Exhibit 5 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 93

Plaintiff's Exhibit 6 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 117

Plaintiff's Exhibit 7 to Plaintiff's Reply to Defendant's Supplemental Memorandum [without exhibits] 139

Notice of Appeal 152

Order Allowing Certiorari 155

NOTES:

The Opinion of the United States Customs Court and Concurring Opinions are printed at 430 F.Supp. 242 and are found in Appendix A to the petition for certiorari, pages 1a-50a.

The Order [and Judgment] of the United States Customs Court is found in Appendix B to the petition for certiorari, pages 53a-54a.

The Opinion of the United States Court of Customs and Patent Appeals and Dissenting Opinion are printed at 562 F.2d 1209 and are found in Appendix C to the petition for certiorari, pages 57a-112a.

Relevant Docket Entries

UNITED STATES CUSTOM COURT

Court No. 76-3-00637

ZENITH RADIO CORP.

v.

UNITED STATES

Date (Filing/Entry)—Proceedings

April 12/76—Complaint filed.

June 10/76—Answer to complaint filed.

June 23/76—Pltf filed motion for Summary Judgment.

June 25/76—Action asgd. to Hon. Herbert N. Maletz, Judge.

July 19/76—Deft filed motion to extend time to Aug. 24/76 to respond to Summary Judgment.

July 29/76—Defts motion to extend time to Aug. 24/76 to respond to Summary Judgment. GRANTED.

Aug 2/76—Deft filed motion for a Three Judge Panel.

Aug 16/76—Pltf refers to the descretion [*sic*] of the court in regard to defts motion for a Three Judge panel.

Aug 24/76—Defendant filed opposition to plaintiff's motion for Summary Judgment and cross motions for a Summary Judgment.

Sept. 10/76—Pltf. filed its reply brief and memorandum in opposition to defts. cross-motion for Summary Judgment.

Date (Filing/Entry)—Proceedings

Sept. 16/76—Defts. motion for a Three Judge Panel Granted. Case reassigned to Chief Judge Boe; Judge Newman and Judge Richardson.

Sept. 22/76—Deft filed motion to extend time to Oct 4/76 to reply to pltfs memo in opposition to defts cross motion for summary judgment.

Oct. 1/76—Pltf. did not respond to defts. motion filed Sept. 22/76. Deft. filed its reply brief to pltfs. memorandum in opposition to defts. cross-motion for summary judgment.

Oct. 6/76—Defts. motion for an order extending defts. time for replying to pltfs. memo. in opposition to defts. cross-motion for summary judgment until Oct. 4/76, granted.

Oct. 6/76—Oral Argument in connection w/the respective Motions for Summary Judgment pending in the instant action, ordered for Tuesday, Nov. 9/76, at 10:00 A. M. in Courtroom No 1 of the U. S. Customs Court, New York, N. Y.

Oct. 26/76—Deft filed motion for leave to file a supplemental memorandum.

Nov. 5/76—Pltf noted opposition to defts motion to file supplemental memorandum.

Nov. 5/76—Deft filed motion for leave to file the English translation of the German Sugar Tax Law of 1896.

Nov. 5/76—Deft's motion for leave to file a supplemental memorandum DENIED. Subject. However, to any subsequent determination by the court requesting such additional memoranda to be submitted.

Date (Filing/Entry)—Proceedings

Nov. 9/76—Deft filed supplemental memorandum, as directed by the court during the oral argument held this day, and pltf. is granted 15 days from this date to file a supplemental memorandum.

Nov. 9/76—Defts. motion for leave to file the English translation of the German Sugar Law of 1896 granted, in as much as deft. is to file within 10 days from this date either a joint translation agreed to by pltf. or seperate [*sic*] translations are to be filed by both pltf. & deft.

Nov. 12/76—Deft filed translation of the German Sugar Tax Law of 1896.

Nov. 15/76—Pltf filed response to Deft's translation of the German Sugar Tax Law of 1896 indicating that it found no material errors in the translation.

Nov. 19/76—Plaintiff filed reply to defendant's supplemental memorandum.

Apr. 12/77—Pltfs. motion for summary judgment, granted. Defts. cross-motion for summary judgment, denied. C.D. 4691.

Relevant Docket Entries

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 77-19

THE UNITED STATES, *Appellant*

v.

ZENITH RADIO CORPORATION, *Appellee*

Date—Proceedings and Orders

ASSISTANT ATTORNEY GENERAL

April 15, 1977—Counsel for appellee: Eugene Stewart and Frederick Ikenson, Philip J. Curtis. Motion of appellant to expedite proceedings, filing times as follows: *Printed transcript* to be filed 30 days after receipt of original record from Customs Court. *Appellant's brief* to be filed simultaneously with printed transcript; *Appellee's brief* to be filed 30 days after service of appellant's brief; *Reply of appellant* to be filed 5 days after service of appellee's brief, filed.

April 18, 1977—No objection to above motion by appellee, filed.

April 21, 1977—Above motion to expedite, granted as follows: Transcript & appellant's brief due May 12, 1977. Appellee's brief due June 1, 1977. Appellant's reply brief due June 6, 1977. Hearing set for June 8, 1977 at 10:00 a.m. See Order re extension and form of papers in file.

April 25, 1977—Record received. (card sent)

May 5, 1977—Motion of American Importers Assn., Inc. to file brief amicus curiae in support of Appellant, filed.

May 6, 1977—Opposition to above motion by appellee, filed.

Date—Proceedings and Orders

May 6, 1977—Above motion of AIA granted, brief to be filed on or before May 12, 1977 (appellee may file reply on or before June 7, 1977).

May 12, 1977—PRINTED RECORD FILED.

May 12, 1977—BRIEF FOR APPELLANT FILED.

May 12, 1977—BRIEF FOR AMICAS [*sic*] CURIAE, filed.

May 23, 1977—Motion by appellee to file brief in excess of fifty pages, not to exceed 10 pages over the limitation, filed.

May 23, 1977—Above motion granted.

June 1, 1977—BRIEF FOR APPELLEE, filed.

June 6, 1977—REPLY BRIEF FOR APPELLANT, filed.

June 8, 1977—Argued

July 28, 1977—Reversed and remanded for entry of an order granting the motion for summary judgment of the United States. Markey, Chief Judge. Dissenting opinion by Judge Miller with whom Judge Baldwin joins.

Aug. 15, 1977—Motion of appellant to stay mandate to September 14, 1977, filed.

August 16, 1977—Above motion granted.

Sept. 8, 1977—Motion of appellee to extend time for issuing the mandate to October 14, 1977, filed.

Sept. 8, 1977—Above motion granted.

Oct. 11, 1977—Petition for Writ of Certiorari filed in Supreme Court of the United States; No. 77-539.

Feb. 21, 1978—Petition for Writ of Certiorari granted.

UNITED STATES CUSTOMS COURT

Summons 76-3-00637

ZENITH RADIO CORPORATION, *Plaintiff*,

v.

UNITED STATES, *Defendant*.

To: The Attorney General and the Secretary of the Treasury:

PLEASE TAKE NOTICE that a civil action has been commenced to contest a determination by the Secretary of the Treasury made pursuant to section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended).

/s/ JOSEPH E. LOMBARDI
Clerk of the Court

Plaintiff is an American manufacturer of certain consumer electronic products, including television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, and parts of television receivers, such as color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits.

1. _____

(Status of plaintiff)

The contested decision is the Secretary of the Treasury's determination that no bounty or grant is being paid or bestowed within the meaning of 19 U.S.C. § 1303 upon the manufacture, production or exportation of certain consumer electronic products from Japan.

2. _____

(Brief description of contested determination by the Secretary of the Treasury)

January 7, 1976

3. _____

(Date of the determination by the Secretary)

January 28, 1976

4. _____

(Date of filing with the Secretary of the plaintiff's written notice of desire to contest such determination)

March 10, 1976

5. _____

(Date of publication by Secretary of notice of desire to contest such determination)

/s/ EUGENE L. STEWART
Eugene L. Stewart
STEWART & IKENSON
1001 Conn. Ave. N.W.
Wash. D.C. 20016
(202) 785-4185

/s/ FREDERICK L. IKENSON
Frederick L. Ikenson
STEWART & IKENSON
1001 Conn. Ave. N.W.
Wash., D.C. 20016
(202) 785-4185

/s/ PHILIP J. CURTIS
Philip J. Curtis
1900 N. Austin Ave.
Chicago, Illinois
60639
(312) 745-5133

Attorneys for Plaintiff

6. _____

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

[FILED: MARCH 11, 1976]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Complaint

Plaintiff, Zenith Radio Corporation, by and through its counsel, alleges herein as follows:

1. Plaintiff brings this action pursuant to 19 U.S.C. § 1516(d), as amended by section 321(f)(1) of the Trade Act of 1974, Public Law 93-618.

2. Plaintiff is a corporation organized under the laws of the State of Delaware, with its principal offices in Chicago, Illinois.

3. Plaintiff is a domestic manufacturer of various consumer electronic products, including the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs, complete with amplifiers and speakers, tape recorders, and color television picture tubes.

4. On April 3, 1970, plaintiff filed with the Commissioner of Customs a petition under 19 U.S.C. § 1303 and 19 C.F.R. § 16.24(b), in which it was alleged that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan. On February 14, 1972, plaintiff filed with the Commissioner of Customs a supplement to its aforesaid petition.

5. On March 20, 1972, the Magnavox Company (hereinafter "Magnavox") filed with the Acting Commissioner of Customs a petition under 19 U.S.C. § 1303 in which it was alleged that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or

production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan. On April 19, 1972, Magnavox filed with the Acting Commissioner of Customs a supplement to its aforesaid petition.

6. Included among the bounties or grants which plaintiff and Magnavox described in their submissions, discussed in ¶¶ 4 and 5, *supra*, as being paid or bestowed on the exportation of certain consumer electronic products from Japan was the exemption of export shipments from a so-called "commodity tax," or the refund of such tax upon exportation, when previously paid.

7. On May 19, 1972, a "Notice of Countervailing Duty Proceedings," in the case of "Certain Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Assistant Secretary of the Treasury, was published in the Federal Register. 37 Fed. Reg. 10087. In this Notice, it was announced that information had been received which raised a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant within the meaning of 19 U.S.C. § 1303. A list of the products involved was provided in an Appendix A. A true and accurate copy of the aforementioned page of the Federal Register, containing the above-described Notice, is annexed hereto as Exhibit A and made a part hereof.

8. On June 8, 1972, a "Notice of Countervailing Duty Proceedings," in the case of "Certain Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Assistant Secretary of the Treasury was published in the Federal Register. 37 Fed. Reg. 11487. This Notice amended the Notice described in ¶ 7 by extending the list of products in Appendix A thereof. A true and accurate copy of the aforementioned page of the

Federal Register is annexed hereto as Exhibit B and made a part hereof.

9. On February 5, 1975, a "Notice of Preliminary Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Commissioner of Customs and approved by the Assistant Secretary of the Treasury, was published in the Federal Register. 40 Fed. Reg. 5378. Although several of the alleged bounties or grants bestowed by Japan upon the manufacture, production or exportation of certain consumer electronic products were discussed in this Notice, no mention was made of the exemption or rebate of commodity tax, referred to in ¶ 6, *supra*. The Commissioner of Customs stated in the Notice that, before a final determination would be made, consideration would be given to any relevant data, views, or arguments submitted in writing with respect to the preliminary determination. A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit C and made a part hereof.

10. On March 3, 1975, plaintiff submitted its comments to the Commissioner of Customs, pursuant to the Notice described in ¶ 9, *supra*, and advised that the Preliminary Determination of February 5, 1975, did not deal with various alleged bounties or grants, including the Japanese commodity tax exemption for or refund on exports.

11. On May 7, 1975, a Notice entitled "Preliminary Countervailing Duty Determination; Bounties and Grants," in the case of "Certain Consumer Electronics Products from Japan," issued by the Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 40 Fed. Reg. 19853. In this Notice, the following was stated:

> "A question has been raised concerning Treasury's determination with respect to other alleged bounties or grants paid or bestowed on this merchandise. To clarify the matter, the notice of February 5 is hereby amended by inserting a new paragraph, following the fourth paragraph, as follows:
>
> 'Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant'."

A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit D and made a part hereof.

12. On January 7, 1976, a "Final Negative Countervailing Duty Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 41 Fed. Reg. 1298. This Determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit E and made a part hereof.

13. On January 28, 1976, plaintiff, through counsel, served a Notice upon the Office of the Secretary of the Treasury, pursuant to 19 U.S.C. § 1516(d), as amended, advising of plaintiff's desire to contest the negative determination referred to in ¶ 12, *supra*, before the Customs Court, and requesting that publication of this Notice be made forthwith, as required by said 19 U.S.C. § 1516(d), as amended.

A true and accurate copy of plaintiff's Notice is annexed hereto as Exhibit F and made a part hereof.

14. On March 10, 1976, a Notice, entitled, "Assessment of Countervailing Duties on Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 41 Fed. Reg. 10235. The Acting Commissioner of Customs announced in this Notice that notification had been received from the plaintiff that it desired to contest the negative countervailing duty determination, referred to in ¶ 12, *supra*. A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit G and made a part hereof.

15. On March 11, 1976, the summons in this action was filed with the Customs Court on behalf of plaintiff.

16. Of the consumer electronic products which were the subject of the "Final Negative Countervailing Duty Determination," described in ¶ 12, *supra*, plaintiff wishes to contest the aforesaid negative determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs, complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products"). Plaintiff is an American manufacturer of merchandise of the same class or kind as the subject electronic products.

17. The Commodity Tax Law of Japan, among other things, provides for the following: a tax, known as a commodity tax, is levied on the shipment of certain kinds of commodities, including all the subject electronic products. The tax base of the commodity tax levied on the shipment of the subject electronic products, manufactured in Japan,

is the manufacturer's sales price. The tax rates at which the commodity tax is levied on the shipment of the aforementioned products are as follows:

Television Receivers—	
Large television receivers (ones using a picture tube of which the maximum field diameter exceeds 69 centimeters)	20%
Small television receivers (ones using a picture tube of which the maximum field diameter is 69 centimeters or less)	15%
Color Television Picture Tubes	
Having a maximum field diameter which exceeds 69 centimeters	20%
Having a maximum field diameter of 69 centimeters or less	15%
Radio Receivers	
Stereophonic (other than ones housed in metal cases of width or height of 90 centimeters or more)	15%
Other than stereophonic (other than ones housed in metal cases of width or height of 90 centimeters or more)	10%
Housed in metal cases of width or height of 90 centimeters or more	5%
Radio-phonograph Combinations	15%
Radio-television-phonograph combinations	
If television qualifies for 20% rate	20%
If television qualifies for 15% rate	15%

Record players and phonographs complete with amplifiers and speakers	15%
Tape players, tape recorders, and radio/tape recorder combinations	
Stereophonic	15%
Other than stereophonic	10%

No commodity tax applies to the shipment of the subject electronic products when the articles are exported. When a commodity tax has been paid in relation to the shipment of a product, and that product is subsequently exported, the exporter is entitled to receive a refund of such tax.

18. Under the Commodity Tax Law of Japan, when the subject electronic products are shipped for export from Japan, they are exempt from payment of any commodity tax. The same articles, when shipped from the manufacturer's factory for consumption in Japan, are subject to such a tax. Also, under the Commodity Tax Law of Japan, when a commodity tax is paid on the shipment of an article which is later exported, the exporter receives a refund of such tax.

19. The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the conferral of an economic benefit upon the manufacture and exportation of the aforesaid products.

20. The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the payment or bestowal of a bounty or grant within the ambit of 19 U.S.C. § 1303.

21. The Secretary of the Treasury has the duty to order the assessment of countervailing duties on the imported subject electronic products in the amount of the commodity taxes which would have been collected by the Japanese Government had such products been sold for home consumption in Japan.

WHEREFORE, it is respectfully prayed that this Honorable Court (1) determine that the Government of Japan is paying or bestowing a bounty or grant on the exportation of the subject electronic products by reason of its exempting such products from taxes which otherwise would have been levied on their shipment from the manufacturer's factory for consumption in Japan, (2) direct the Secretary of the Treasury to order the assessment of countervailing duties on imports of the aforementioned products from Japan in amounts equal to the net bounties or grants as described herein, and (3) provide any other relief which this Honorable Court deems just and proper.

Respectfully submitted,

/s/ EUGENE L. STEWART
Eugene L. Stewart, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 785-4185

/s/ FREDERICK L. IKENSON
Frederick L. Ikenson, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel: (202) 785-4185

/s/ PHILIP J. CURTIS
Philip J. Curtis, Esq.
1900 North Austin Avenue
Chicago, Illinois 60639
Tel: (312) 745-5133

Attorneys for Plaintiff

April 9, 1975 [*sic*]

[FILED: APRIL 12, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

[Exhibit A to Complaint]

DEPARTMENT OF THE TREASURY

BUREAU OF CUSTOMS

CERTAIN ELECTRONIC PRODUCTS FROM JAPAN

Notice of Countervailing Duty Proceedings

Information has been received pursuant to the provisions of § 16.24(b) of the Customs Regulations (19 CFR 16.24 (b)) which raises a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates or refunds apply. A list of these products is provided in Appendix A below.

The approximate amount of the payments, bestowals, rebates, or refunds applicable to certain consumer electronic products from Japan has not yet been ascertained.

After the expiration of the time limits set forth in this notice, a determination will be made whether a bounty or grant is being paid or bestowed in connection with any such manufacture, production, or export. If it is determined that a bounty or grant is being paid or bestowed, an appropriate countervailing duty order will be issued and published in accordance with § 16.24 of the Customs Regulations (19 CFR 16.24).

Before a determination is made, consideration will be given to any relevant data, views, or arguments submitted in writing with respect to the existence or nonexistence, and the net amount of a bounty or grant. Submissions should be addressed to the Commissioner of Customs, 2100 K

Street NW., Washington, D.C. 20226, in time to be received by his office not later than 30 days from the date of publication of this notice in the FEDERAL REGISTER.

This notice is published pursuant to § 16.24(d) of the Customs Regulations (19 CFR 16.24(d)).

[SEAL] LEONARD LEHMAN,
Acting Commissioner of Customs.

Approved: May 17, 1972.

EUGENE T. ROSSIDES,
Assistant Secretary of the Treasury.

APPENDIX A

Television Receivers.

Radio Receivers.

Radio-Phonograph Combinations.

Radio-Television-Phonograph Combinations.

Radio/Tape Recorder Combinations.

Tape Players.

Record Players and Phonographs complete with amplifiers and speakers.

Tape recorders.

[F.R. Doc. 72-7714 Filed 5-18-72; 9:41 a.m.]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 37, No. 98—Friday, May 19, 1972
[Page 10087]

[Exhibit B to Complaint]

DEPARTMENT OF THE TREASURY

BUREAU OF CUSTOMS

• • • • •

CERTAIN ELECTRONIC PRODUCTS FROM JAPAN

Notice of Countervailing Duty Proceedings

The "Notice of Countervailing Duty Proceedings" with respect to certain electronic products from Japan published in the FEDERAL REGISTER of May 19, 1972 (37 F.R. 10087, F.R. Doc. 72-7714), is amended by inserting the following: "Parts of television receivers: Color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits," after the words "Television Receivers." in Appendix A of the notice. The notice is also amended by extending the time period for the receipt of relevant data, views, or arguments with respect to the existence or nonexistence, and the net amount of a bounty or grant, from 30 days to 60 days from the date of publication of the above-cited notice in the FEDERAL REGISTER.

[SEAL] EDWIN F. RAINS,
Acting Commissioner of Customs.

Approved: June 5, 1972.

EUGENE T. ROSSIDES,
Assistant Secretary of the Treasury.

[F.R. Doc. 72-8689 Filed 6-6-72; 10:01 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 37, No. 111—Thursday, June 8, 1972
[Page 11487]

[Exhibit C to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONICS PRODUCTS FROM JAPAN

Notice of Preliminary Determination

In the FEDERAL REGISTER of May 19, 1972 (37 FR 10087), there was published a "notice of countervailing duty proceedings" in which the Commissioner of Customs announced that information had been received pursuant to the provisions of § 16.24(b) of the Customs Regulations (currently 19 CFR 159.47(b), Customs Regulations) which raised a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constituted the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) (referred to in this notice as "the Act"), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates or refunds applied. This notice was amended by a second notice which was published in the FEDERAL REGISTER of June 8, 1972 (37 FR 11487). The notices enumerated specific consumer electronic products under consideration which are set forth in Appendix A below. In accordance with the provisions of the second notice dated June 8, a time period of 60 days was provided from the date of the original notice for the receipt of relevant data, views, or arguments with respect to the existence or nonexistence, and the net amount, of any bounty or grant within the meaning of section 303 of the Act.

On the basis of an investigation conducted pursuant to § 159.47(c), Customs Regulations (19 CFR 159.47(c)), it has been determined that benefits have been received under

three programs which constitute bounties or grants within the meaning of section 303 of the Act. These programs include preferential interest rate loans from the Japanese Development Bank, promotional assistance from the Japan External Trade Organization (JETRO), and tax deferrals under the Overseas Market Development Reserve.

In the first two programs, the benefits bestowed on exporters involve an amount considered to be *de minimis*. In the case of the Overseas Market Development Program, the aggregate data available indicates that the pro rated benefits to exporters of the consumer electronic products in question are also *de minimis*, and that, when considered in this light in the aggregate, all three programs combined are also considered *de minimis*. Since the Overseas Market Development Program is available only to firms which are capitalized at less than one billion yen, however, significant benefits could conceivably be concentrated in a few smaller firms exporting these products to the United States. In order to ensure that significant bounties or grants are not being paid or bestowed under this program, the Commissioner of Customs will require reports from Japanese firms eligible for tax deferrals under the Overseas Market Development Program and exporting the consumer electronic products in question to the United States to ascertain whether and to what extent, they benefit from the program.

If it is determined that no Japanese firm benefits from the Overseas Market Development Program in an amount more than *de minimis* in relation to the quantity of exports involved a final negative determination will be issued. If it is determined that any Japanese firms do benefit from this program by an amount that is more than *de minimis* in relation to the quantity of exports involved an affirmative determination will be issued as to such firms, and, additionally, suspension of liquidation will be ordered as to entries of the subject merchandise manufactured or exported by any firm which is eligible for benefits under the program but has not submitted the required report. Such

suspension of liquidation would remain in effect until the report was received and a determination made as to whether a bounty or grant were being paid or bestowed.

Before a final determination is made, consideration will be given to any relevant data, views or arguments, in addition to the required reports described above, submitted in writing with respect to the preliminary determination. Submissions should be addressed to the Commissioner of Customs, 2100 K Street, NW., Washington, D.C. 20229, in time to be received by his office on or before March 7, 1975. This preliminary determination is published pursuant to section 303(a) of the Tariff Act of 1930 (19 U.S.C. 1303(a)).

VERNON D. ACREE,
Commissioner of Customs.

Approved: January 30, 1975.

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

APPENDIX A

Televisions receivers.

Parts of television receivers: Color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits.

Radio receivers.

Radio—Phonograph combinations.

Radio—Television-Phonograph combinations.

Radio/tape recorder combinations.

Tape players.

Record players and phonographs complete with amplifiers and speakers.

Tape recorders.

[F.R. Doc. 75-3160 Filed 2-4-75; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 40, No. 25—Wednesday, February 5, 1975 [Page 5378]

[Exhibit D to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONICS PRODUCTS FROM JAPAN

Preliminary Countervailing Duty
Determination; Bounties and Grants

A "Notice of Preliminary Determination" was published in the FEDERAL REGISTER of February 5, 1975 (40 FR 5378, FR Doc. 75-3160) announcing that a preliminary determination had been made that benefits have been paid or bestowed on certain consumer electronic products from Japan under three programs which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303).

A question has been raised concerning Treasury's determination with respect to other alleged bounties or grants paid or bestowed on this merchandise. To clarify the matter, the notice of February 5 is hereby amended by inserting a new paragraph, following the fourth paragraph, as follows:

Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant.

Any relevant data, views, or arguments respecting this amendment should be submitted in writing to the Commissioner of Customs, 2100 K Street, NW., Washington, D.C. 20229, in time to be received by his office on or before May 30, 1975.

VERNON D. ACREE,
Commissioner of Customs.

Approved: May 2, 1975.

JAMES B. CLAWSON,
Acting Assistant Secretary of the Treasury.

[FR Doc. 75-11988 Filed 5-6-75; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 40, No. 89—Wednesday, May 7, 1975
[Page 19853]

[Exhibit E to Complaint]

DEPARTMENT OF THE TREASURY

• • • • •

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

Final Negative Countervailing Duty Determination

On February 5, 1975, a "Notice of Preliminary Determination" was published in the FEDERAL REGISTER (40 F.R. 5378) announcing that it had been determined preliminarily that benefits have been paid or bestowed on certain consumer electronic products from Japan under the three programs administered by the Government of Japan which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303). An amendment to the notice was published in the FEDERAL REGISTER on Mary [*sic*] 7, 1975 (40 F.R. 19853) stating that other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant. The amended notice provided for the submission of any relevant data, views, or arguments to the Commissioner of Customs. No written submissions were received pursuant to the amended notice.

Pursuant to the investigation, additional facts were developed regarding benefits to Japanese exporters under the Overseas Market development Program referred to in that notice in order to determine to what extent certain firms which are capitalized at less than one billion yen benefit from the program.

The information developed in the investigation established that benefits from programs involving preferential interest rate loans from the Japanese Development Bank,

promotional assistance from the Japan External Trade Organization (JETRO), and tax deferrals under the Overseas Market Development Reserve, involve an aggregate amount considered to be *de minimis* per dollar of value of the exported products.

Accordingly, on the basis of the additional facts gathered and the investigation conducted pursuant to section 159.47(c) Customs Regulations (19 CFR 159.47(c)), a final determination is hereby made in this proceeding, that for the reasons stated, herein and in the notice referred to above, no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan.

The notice is published pursuant to section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303).

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved: December 31, 1975.

PETER O. SUCHMAN,
Acting Assistant Secretary of The Treasury.

[F.R. Doc. 76-318 Filed 1-6-76; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 41, No. 4—Wednesday, January 7, 1976 [Page 1298]

[Exhibit F to Complaint]

BEFORE THE UNITED STATES DEPARTMENT OF THE TREASURY

NOTICE PURSUANT TO 19 U.S.C. § 1516(d) TO CONTEST THE DETERMINATION BY THE SECRETARY OF THE TREASURY UNDER 19 U.S.C. § 1303 THAT A BOUNTY OR GRANT IS NOT BEING BESTOWED ON THE MANUFACTURE, PRODUCTION OR EXPORTATION OF CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

To The Honorable William E. Simon
Secretary of the Treasury
Washington, D.C.

On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of *Certain Consumer Electronic Products From Japan* was published in the Federal Register. 41 Fed. Reg. 1298. The Determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."

One of the complaints which led to this determination was filed with the Commissioner of Customs on April 3, 1970, by Zenith Radio Corporation, a domestic manufacturer of consumer electronic products. On behalf of Zenith Radio Corporation, we are hereby giving you notice, pursuant to 19 U.S.C. § 1516(d), of our desire to contest Treasury's negative determination before the United States

Customs Court, and we ask that you cause publication of this notice forthwith, as required by said 19 U.S.C. § 1516(d).

Respectfully submitted,

/s/ STEWART & IKENSON
Stewart & Ikenson

/s/ PHILIP J. CURTIS
Philip J. Curtis, Esq.

Attorneys for Zenith Radio Corporation

January 28, 1976

[Exhibit G to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

[T.D. 76-71]

ASSESSMENT OF COUNTERVAILING DUTIES ON CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

Petition Filed by American Manufacturer, Producer or Wholesaler

On January 7, 1976, a "Final Countervailing Duty Determination" in the case of Certain Consumer Electronic Products from Japan was published in the FEDERAL REGISTER, 41 FR 1298. The determination stated that a "final determination is hereby made, • • • no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan." The complaint which led to this determination was filed with the Customs Service on April 3, 1970.

On January 28, 1976, notification was received by the Department that Zenith Radio Corporation, an American manufacturer of certain consumer electronic products, desires to contest the above-noted negative determination.

In accordance with the provisions of section 516(d), Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516(d)), publication is hereby made of the fact that the necessary notice has been received that an American manufacturer desires to contest the determination that a bounty or grant is not being bestowed, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), on certain consumer electronic products from Japan.

LEONARD LEHMAN,
Acting Commissioner of Customs.

Approved: February 27, 1976

JAMES J. FEATHERSTONE,
Acting Assistant Secretary of the Treasury.

[FR Doc. 76-6701 Filed 3-9-76; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 41, No. 48—Wednesday, March 10, 1976 [Page 10235]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Defendant's Answer

Defendant, answering the allegations of plaintiff's complaint, admits, denies, and otherwise responds thereto as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. Admits.
6. Admits.
7. Admits.
8. Admits.
9. Admits.
10. Admits.
11. Admits.
12. Admits.
13. Admits.
14. Admits.
15. Admits.
16. Admits.

17. Admits that the Commodity Tax Law of Japan provides, among other things, that a tax, known as a commodity tax, be levied on certain kinds of commodities manufactured in Japan, which have been shipped for home consumption, including all the electronic products enumerated in paragraph 17 of the complaint. Admits that gen-

erally the tax base of the commodity tax levied on electronic products manufactured in Japan and which have been shipped for home consumption, is the manufacturer's sales price. Denies that the manufacturer's sales price is the tax base for such products in all instances. Denies that the tax rates set forth in paragraph 17 are applicable to the enumerated products for lack of knowledge or information sufficient to form a belief as to the truth thereof. Admits that no commodity tax is applicable to the enumerated electronic products when they are shipped for export. Admits that when a commodity tax has been paid in relation to a product which is subsequently exported, the exporter is entitled to receive a refund of the tax. The allegations of paragraph 17 are denied in all other respects.

18. Admits that under the Commodity Tax Law of Japan the electronic products enumerated in paragraph 17 are exempt from payment of any commodity tax when they are shipped for export from Japan. Denies that the same articles when shipped from the manufacturer's factory for consumption in Japan are always subject to such a tax. Admits that under the Commodity Tax Law of Japan, when a commodity tax is paid on an article which has been shipped for home consumption but is later exported, the exporter receives a refund of such tax.

19. Denies.

20. Denies.

21. Denies.

22. All allegations of material fact contained in the complaint which have not been expressly admitted, denied, or qualified, are hereby denied.

WHEREFORE, defendant respectfully requests the Court to enter judgment holding that the Secretary of the Treasury properly determined that no bounty or grant is being

paid or bestowed, directly or indirectly within the meaning of section 303 of the Tariff Act of 1930, as amended, upon the manufacture, production, or exportation of the electronic products enumerated in the complaint from Japan, and denying plaintiff's requests for relief.

Respectfully submitted,

/s/ REX E. LEE
Rex E. Lee
Assistant Attorney General

/s/ DAVID M. COHEN
David M. Cohen
Acting Chief, Customs Section

/s/ VELTA A. MELNBRENCIS
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

June 10, 1976

New York, New York

[Filed: June 10, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

[Caption Omitted in Printing]

Plaintiff's Motion for Summary Judgment

Pursuant to the provisions of Rules 4.12 and 8.2, Rules of the United States Customs Court, motion is hereby made for an order granting summary judgment in favor of the plaintiff and sustaining the claim in the subject civil action for the reasons set forth in the brief annexed hereto and made a part hereof.

Respectfully submitted,

/s/ EUGENE L. STEWART
Eugene L. Stewart, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 785-4185

/s/ FREDERICK L. IKENSON
Frederick L. Ikenson, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 785-4185

/s/ PHILIP J. CURTIS
Philip J. Curtis, Esq.
1900 North Austin Avenue
Chicago, Illinois 60639
Telephone: (312) 745-5133

Attorneys for Plaintiff

Dated: June 21, 1976

[Filed: June 23, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Plaintiff's Statement Pursuant to Rule 8.2(b)

Pursuant to Rule 8.2(b), Rules of the United States Customs Court, plaintiff respectfully submits that there can be no genuine triable issue with respect to the following facts:

1. Plaintiff is a domestic manufacturer of various consumer electronic products, including the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, and color television picture tubes.

2. Plaintiff, in 1970, and the Magnavox Company, in 1972, filed with the Commissioner or Acting Commissioner of Customs petitions under 19 U.S.C. § 1303, alleging that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan.

3. In 1972, both plaintiff and the Magnavox Company filed supplements to the petitions described in paragraph 2, *supra*.

4. Included among the bounties and grants which plaintiff and the Magnavox Company described in their submissions, discussed in paragraphs 2 and 3, *supra*, as being paid or bestowed on the exportation of certain consumer electronic products from Japan was the exemption of export shipments from a so-called "commodity tax," or the refund of such tax upon exportation, when previously paid.

5. On January 7, 1976, a "Final Negative Countervailing Duty Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register, 41 Fed. Reg. 1298, and contained the statement that: "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."

6. The "Certain Consumer Electronic Products from Japan" involved in the subject countervailing duty investigation which led to the determination referred to in paragraph 5, *supra*, included, *inter alia*, the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products").

7. On January 28, 1976, plaintiff, through counsel, served a Notice upon the Office of the Secretary of the Treasury, pursuant to 19 U.S.C. § 1516(d), as amended, advising of plaintiff's desire to contest the negative determination referred to in paragraph 5, *supra*, before the Customs Court, and requesting that publication of this Notice be made forthwith, as required by said 19 U.S.C. § 1516(d), as amended.

8. On March 10, 1976, a Notice, entitled "Assessment of Countervailing Duties on Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Regis-

ter, 41 Fed. Reg. 10235, and contained the announcement that notification had been received from the plaintiff that it desired to contest the negative countervailing duty determination referred to in paragraph 5, *supra*.

9. On March 11, 1976, the summons in this action was filed with the Customs Court on behalf of plaintiff.

10. Under the Commodity Tax Law of Japan (a) a tax known as a commodity tax is levied on the shipment for home consumption of certain kinds of commodities manufactured in Japan, including all the subject electronic products; (b) the subject electronic products are exempt from payment of any commodity tax when they are shipped for export from Japan; and (c) when a commodity tax is paid on an article which has been shipped for home consumption but is later exported, the exporter receives a refund of such tax.

11. As a result of the exemption of the subject electronic products from payment of any commodity tax when exported from Japan, Japanese exporters of the subject electronic products are able to sell such products in the United States market at a price lower than that at which they can sell such products in Japan or at a price that would assure a greater profit than could be earned in Japan.

Respectfully submitted,

/s/ Eugene L. Stewart
Eugene L. Stewart, Esq.
Stewart & Ikenson
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 785-4185

/s/ Frederick L. Ikenson
Frederick L. Ikenson, Esq.
Stewart & Ikenson
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 785-4185

/s/ Philip J. Curtis
Philip J. Curtis, Esq.
1900 North Austin Avenue
Chicago, Illinois 60639
Telephone: (312) 745-5133

Attorneys for Plaintiff

Dated: June 21, 1976

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

[Plaintiff's Proposed] Order and Judgment

Upon reading and filing plaintiff's Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment and the parties' briefs and legal memoranda and all other papers and proceedings had herein, it is

HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion is granted and plaintiff's claim is sustained;

2. Defendant's Motion is denied;

3. The exemption, under the Commodity Tax Law of Japan, of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products") from a commodity tax, when shipped for export from Japan, or the refund of such tax on the exportation from Japan of the subject electronic products, constitutes the payment or bestowal of a bounty or grant within the embrace of 19 U.S.C. § 1303; and

4. The Secretary of the Treasury is directed to ascertain and determine, or estimate the amounts of the aforedescribed tax exemptions or refunds on the exportation of the subject electronic products from Japan and to order the appropriate Customs officers throughout the United States to assess countervailing duties, in amounts equal to the aforedescribed tax exemptions or refunds, on the subject electronic products exported from Japan, entered

or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order.

_____

JUDGE

Dated: New York, New York

_____, 19—

UNITED STATES CUSTOMS COURT

BEFORE: HON. HERBERT N. MALETZ, *Judge*

[CAPTION OMITTED IN PRINTING]

Defendant's Cross-Motion for Summary Judgment

Pursuant to Rules 4.12 and 8.2, Rules of the United States Customs Court, defendant hereby cross-moves for summary judgment holding that the Secretary of the Treasury properly determined that no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, as amended upon the manufacture, production, or exportation from Japan of the electronic products enumerated in the complaint.

Defendant's motion is based on the annexed Statement of Material Facts and the annexed Brief and exhibits.

Respectfully submitted,

/s/ REX E. LEE
Rex E. Lee
Assistant Attorney General

/s/ DAVID M. COHEN
David M. Cohen
Acting Chief, Customs Section

/s/ VELTA A. MELNBRENCIS
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

[Filed: August 24, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

BEFORE: HON. HERBERT N. MALETZ, *Judge*

[CAPTION OMITTED IN PRINTING]

Defendant's Statement of Material Facts

Pursuant to Rule 8.2(b), Rules of the United States Customs Court, defendant respectfully submits that there is no genuine issue with respect to the facts alleged in paragraphs 1 through 9, 10(b), and 10(c) of plaintiff's statement pursuant to Rule 8.2(b).

Defendant submits that there is a dispute with regard to paragraph 10(a) to the extent it states or implies that certain kinds of commodities, including all the subject electronic products, are always subject to a commodity tax (see para. 17 and 18 of the complaint and answer). Under our reading of the commodity tax law, no commodity tax is imposed when otherwise taxable commodities are sold to or for:*

(i) schools, other educational institutions, and educational use;

(ii) academic research organs and academic research use;

(iii) persons engaging in activities under the Social Welfare Services Act or engaging in activities related to social welfare or for use of institutions related to social welfare activities; and

(iv) the National Museum;

(v) other persons specified by Government ordinance.

---

* See Article 22 of the 31 March 1962 Law No. 48 shown as attached Exhibit A, which is a purported English translation of the Japanese law deemed applicable by plaintiff and supplied by plaintiff's counsel.

Defendant further submits that to the extent that plaintiff deems the allegations of paragraph 11 of its statement relevant and material, there exists a genuine dispute of fact (see par. 19 of the complaint and answer). Plaintiff has failed to produce any proof whatsoever to substantiate this allegation, much less to demonstrate that there is no genuine dispute as to such facts.

Respectfully submitted,

/s/ Rex E. Lee
Rex E. Lee
Assistant Attorney General

/s/ David M. Cohen
David M. Cohen
Acting Chief, Customs Section

/s/ Velta A. Melnbrencis
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

New York, New York

UNITED STATES CUSTOMS COURT

Before: Hon. Herbert N. Maletz, *Judge*

[Caption Omitted in Printing]

[Defendant's Proposed] Order

Upon reading and filing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, the briefs in support of the motions, and all other papers and proceedings herein, it is hereby

Ordered, Adjudged, and Decreed that:

1. Plaintiff's motion be, and the same hereby is, denied;

2. Defendant's cross-motion be, and the same hereby is, granted; and

3. The Secretary of the Treasury's determination that no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, as amended, upon the manufacture, production, or exportation from Japan of the electronic products enumerated in the complaint, is hereby affirmed.

_____
Judge

Dated: New York, New York

This —— day of ————————, 1976.

[Exhibit A to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment]

Commodity Tax Law

(31 March 1962 Law No. 48)

Related Laws (Tax Laws):

Revisions: 1962—Law 67, 1964—Law 22,
1965—Laws 30 and 31,
1966—Laws 34 and 39,
1967—Law 14, 1968—Law 13
1973—Law 22

Chapter 1. General Provisions

(Taxable Items)

Article 1. Commodity taxes will be levied on commodities given in the attached table in accordance with this law.

(Definitions)

Article 2. Meanings of terms used in this law are given below.

(a) Taxable commodities. These are commodities given in the attached table other than commodities which are not subject to commodity taxes in accordance with provisions of Article 9.

(b) Nontaxable commodities. These are commodities other than those given in the attached list.

(c) Bonded areas. These are bonded areas specified in the Customs Act (1954 Law No. 61), Article 29 (Kinds of Bonded Areas).

(Taxed Persons)

Article 3. Persons selling Class 1 commodities are obligated to pay commodity taxes on Class 1 commodities which have been sold (limited to those corresponding to taxable commodities).

2. Persons manufacturing Class 2 commodities are obligated to pay commodity taxes on Class 2 commodities which have been shipped from the factory of their manufacture (limited to those corresponding to taxable commodities).

3. Persons receiving taxable commodities from bonded areas are obligated to pay commodity taxes on taxable commodities received.

(Factories Corresponding to Bonded Areas)

Article 4. When a factory of Class 2 commodities corresponds to a bonded area, commodities manufactured at that factory which correspond to domestic cargo as provided in Article 2, Item 1, No. 4 (Definitions) of the Customs Act (including manufactured products specified under Article 59, Item 2 of the Customs Act (Domestic Cargo Use Etc.) other than those considered to be foreign cargo), that factory is considered to be a Class 2 commodity factory which does by a document specified by government ordinance giving details concerning export of the commodities and other information provided for by the same item.

3. Provisions of the previous two items apply to cases in which commodities held by a distributor of Class 2 commodities (excepting persons who are manufacturers of Class 2 commodities in accordance with provisons of Item 1) are exported for purposes of sale and are Class 2 taxable commodities. In this case, "an amount" in Item I will read "considering the commodity tax corresponding to the amount as having been paid by the distributor, that

amount," and "location of the factory of manufacture of the commodities" in the previous item will read "location of the sales depot specified in Article 27, Item 1 related to the export by that person."

4. The additional refund specified in the Common Rules of National Taxes Act (1962 Law No. 66) is not added to refunds specified in Item 1 (including cases covered by the previous item).

(Special Use Exemption of Commodities Related to Sale or Export)

Article 22. When a distributor of Class 1 commodities or a manufacturer of Class 2 commodities respectively sell items purchased in a manner determined by government ordinance for purposes of providing services specified below which are Class 1 taxable commodities given below or ships from the factory of their manufacture for purposes of sale Class 2 taxable commodities given below which are purchased in a manner specified by government ordinance for purposes of providing services specified below, commodity taxes related to the sale or shipment shall not be levied.

(a) Schools specified in the School Education Act (1947 Law No. 26), Article 1 (Range of Schools) and other educational institutions specified by government ordinance: Class 1 and Class 2 taxable commodities provided for educational use as determined by government ordinance.

(b) Academic research organs specified by government ordinance Class 1 and Class 2 taxable commodities provided for academic research use as determined by government ordinance.

(c) Persons engaging in activities given in the Social Welfare Services Act (1951 Law No. 45), Article 2, Item 2, Nos. 3 through 5 (Definitions) and other persons engaging in activities related to social welfare as determined by

government ordinance: Class 1 and Class 2 taxable commodities provided for use of institutions related to these activities as determined by government ordinance.

(d) The National Museum and others not specified in (c) above as determined by government ordinance: Class 1 and Class 2 taxable commodities provided for their use as determined by government ordinance.

2. Provisions of the previous item do not apply when a distributor of Class 1 commodities making a sale or shipment under the item respectively do not submit, with reports specified in Article 29, Items 1 and 2 for the month of the date on which the sale or shipment was made (limited to ones submitted within the time limits specified for the reports), documents specified by government ordinance which certify that the commodities were purchased by persons specified under the previous item in a manner specified in the previous item. However, this does not apply when provisions of the text of Item 6 have been applied.

3. Provisions of Article 17, Item 3 apply to cases under the previous item.

4. Persons specified under Item 1 who purchased Class 1 or Class taxable commodities specified under the same item must, by the last day of the month following the month of the day of that purchase, submit to the head of the competent district tax office of the location of the use a document giving information specified by government ordinance such as use of the commodity, name and quantity of the commodity, and the location of its use.

5. Persons specified in the previous item, for a period of two years from the date of purchase of commodities of the same item, must not use them for other than the use specified or transfer them. However this does not apply when the commodities are used for other than the use specified or transferred during the specified time period because of

unavoidable circumstances and approval of the head of the competent district tax office of the location of their use is obtained in accordance with procedures specified by government ordinance.

UNITED STATES CUSTOMS COURT

Memorandum—Appendix A

[Exhibit C to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment]

Does Russia pay or bestow, directly or indirectly, any bounty or grant upon the export of sugar?

The following statement shows the relation of the Russian Government to the sugar industry.

1. The Government establishes the maximum price of refined sugar in the domestic market.

2. Estimating the demand for home consumption, it permits the refiners to put on the market, under a tax of 1.75 a certain limited quantity, well within the known home consumption.

3. When satisfied that a larger supply can be added without prejudice to current prices, it advances the limit of ouput to the refiners, with no increase in tax, but provides that any excess put upon the home market shall be taxed at 3.50 or twice the regular tax (1.75).

4. The interest of the individual refiner then lies in putting out all he can at a tax of 1.75 and none under the tax of 3.50.

5. The inevitable result is an excess of stock in the hands of the refiners as a whole, and to get rid of this surplus it is exported. Now, a method exists by which refiner A can get the benefit of the failure of refiner B to supply the home market with his full quota. Home refiner A becomes willing to pay refiner B a certain reward if he will export a certain portion of his alloted quota and give A the official evidence of such exportation, which enables A to sell in the home market at a tax of 1.75 an equivalent portion of the sugar produced by him (A) in excess of his quota.

6. The maximum prices fixed by the Minister of Finance are always reached by the trade, and are such as to give a very large profit to the producer, particularly in those provinces where owing to better economic conditions of the population, the demand for sugar exceeds the local supply from the stock entitled to withdrawal for consumption at a single tax. The ability of the producers of sugar in certain regions to obtain higher prices than those obtained in other regions, gives rise to the arrangement mentioned in paragraph 5.

8. It is impossible to know whether or not the Government had this in mind (an encouragement to export) in arranging its system of sugar taxation. That it results in a bonus from some source to those who export sugar, there can be no doubt. [*Sic*—no paragraph 7.]

9. The amount of such bonus, as shown by the reports of our consul at Odessa, is represented by the price of export certificates which are sold by the exporters of sugar to those refiners who have an excess of sugar for sale in the home market; the minimum price of such certificates is one rouble per pood. This arrangement enables the exporting refiner to sell his sugar for export at a price .50 roubles below the cost of production and still realize a profit of not less than .50 rouble per pood.

In view of these anomalous conditions, clearly created by the Government regulation of the sugar industry in Russia, this Department has come to the conclusion that Russia indirectly pays or bestows a bounty on the export of sugar within the contemplation of Section 5 of the Act of July 24, 1897, and that the minimum net amount of such bounty is .50 rouble per pood, i.e. equal to the minimum net profit realized by the exporter of such sugar over the cost of production; and that the amounts realized on the export of inferior grade of sugar are less in proportion to the respective values of the several grades.

A circular proclaiming the amounts of the bounties so ascertained and determined was accordingly issued on the 14th of February last (copy herewith).

A detailed statement of the Russian laws and regulations, and of the conditions created thereby, is found on pages 3334-3340 of the Congressional Record, Volume 34, No. 64, of the 21st ultimo, a copy of which is also submitted herewith.

UNITED STATES CUSTOMS COURT

[Exhibit 2 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

• • • • •

STATEMENT OF JOSEPH S. WRIGHT, CHAIRMAN OF THE BOARD, ZENITH RADIO CORP.

I am Joseph S. Wright, Chairman of Zenith Radio Corporation, and, among other things, a member of the newly-created Advisory Council on Japan-U.S. Economic Relations.

While our company is a leading member of the consumer electronics industry in the U.S. and many parts of the world, I wish to make it plain that I am speaking only for myself in this testimony and that while there are many people in our industry who share my views on many points, ours is an extremely competitive industry and it is composed of many diverse components which lead us to divergent points of view on most any subject that you could name.

I would like to tell you a little something about our industry as a background. I know the Committee does not wish to get involved in the details of a particular industry or company, except insofar as it contributes to a better understanding of our country's over-all trade problem. If I seem to be dwelling over much on Zenith and our industry, I hope you will understand that it is not intended to ask this Committee to solve the problems of a particular industry. I only hope that the background of our experience can be helpful to you in arriving at a better understanding of the nation's over-all trade problems.

Zenith was a small company, started on a kitchen table more than 50 years ago, and has grown and prospered to its present size by achieving a reputation for quality and integrity among dealers and consumers of our products

throughout the world. We are not a conglomerate, but have specialized in consumer electronics over the years. We have played a major role in almost every development in our industry. We have also played an important part in producing highly sophisticated electronic products and systems for national defense, although from a dollar standpoint this is a small part of our business. Our sales volume in 1970 was 573 million dollars and our average employment in the U.S. was approximately 20 thousand people. In addition to our own direct employment, we provide employment for many thousands of other people who make components which we use in our operations—tuners, speakers, semi-conductors, capacitors, tubes, cabinets, and a host of other products. We are the largest producer of TV receivers both black-and-white and color, having produced and sold more than 2 million TV receivers per year for many years. Last fall we produced our 25 millionth TV receiver, and up to now every one of these sets has been made in the U.S. In addition, we are the largest exporter of such products from the U.S. and have fought for many years to open up foreign markets for American made products. I deeply appreciate the opportunity to appear before this Committee to tell you about some of our experiences and some of the problems that we see facing our country and our foreign trade, employment and balance of payments problems.

I would like to start out by saying that I think we do ourselves a very grave injustice when so often we discuss this matter of our trade policy by using the polarizing terms of "free trade" and protectionism." [*Sic.*] These are emotional tags which stir people up one way or another and they really work against our ability to solve some of these most difficult problems.

THE CONDITION OF OUR INDUSTRY

The consumer electronics products industry has for all of its existence been one of the most highly competitive,

efficient and innovative industries in our country. It has made our mass communications the best in the world. Long before there was any competition from foreign imports, our industry invariably passed on to the public in the form of lower prices and better products, the full benefit of our growing technology and productivity. As a matter of fact, from 1950 to 1963, in the face of rising prices and wage costs throughout the economy, the average unit prices of black-and-white television receivers decreased by more than one-third. Television receiver production has always been so extremely competitive that the mortality rate of the companies in the business has been very high. Many great names in our industry just in the past 15 years have found the going so tough they got out of the business—Capehart, CBS, Dumont, Hotpoint, Stromberg-Carlson, Westinghouse, Webcor to name just a few.

I would like to show you a chart which contains the Bureau of Labor statistics consumer price indices from 1952. You will note that the 1970 index of prices for all products and services stands at nearly 150 from the base year of 1952, while the indices of prices for TV and radio have steadily declined from 1952 and stand at 72 and 68 respectively. This has been accomplished in the face of sharply rising wages and costs of purchased materials. Remember also that radios in 1970 have FM and often stereo; and that TV is not the small screen black-and-white of 1952 but in 1970 includes large screen color and vastly improved products from the standpoint of service and reliability. You will note that this steadily declining index of prices, despite tremendous product improvement antedates by a long time the flood of imported products which has in the past few years virtually inundated our industry.

I dwell on these points with some pride only to show that our situation is not that of an industry which has lost its vigor and must be protected from more efficient competitors abroad. On the contrary, the prices of our products

are lower in the United States than in any country in the world, including Japan and Germany.

I have attached to this statement a series of charts entitled "U.S. Imports in the Consumer Electronics Industry," which are graphic presentations of official Electronic Industries Association statistics showing what has been happening in the major categories of our business from 1960 through the first quarter of 1971. The red parts of the bar showing imports have an added broken line which shows the portion of imports which are under U.S. label; the balance, of course, are under foreign labels. The numbers are all in units produced or imported.

In the late 1950's, millions of low-priced Japanese transistor radios poured into the United States. As shown in the charts, by 1960, 55 percent of all portable radios sold in the United States were of Asiatic origin. By 1968, this figure rose to almost 95 percent and has remained at almost that level through the first quarter of 1971. For total radios, including portables but excluding automobile radios, imports accounted for approximately 91 percent of the market in 1970 and we estimate that the U.S. will produce less than 5 percent of the whole U.S. home radio market of about 40 million sets in 1971. Except for certain specialty types, the manufacture in the United States of radios was made economically impossible within ten years of the invasion by the Japanese.

I would like to turn now to television products. As shown in the charts, in 1962, monochrome imports, exclusively from Japan, held 2.4 percent of the total black-and-white television market of 6 million 609 thousand units, but in 1970, imports accounted for 51 percent of the total U.S. market of 7 million 47 thousand black-and-white units and, as you can see from the charts, imports held approximately this same share in the first quarter of 1971. Imports have thus increased their percent share of the U.S. market by

over 20 times in a black-and-white television receiver market which will continue to be of great importance, despite increased color television receiver sales. While 90 percent or more of the imported receivers since 1960 originated in Japan, in recent years black-and-white television receivers are beginning to be imported in quantity from Taiwan, Mexico, and other countries, as American manufacturers have sought to compete with the Japanese.

In the area of color television, in 1965, imports from Japan were only 2.6 percent of the total color market of 2 million 649 thousand units, but in 1970, imports—almost all of which came from Japan—held almost 18 percent of the total U.S. market of 5 million 219 thousand color units. This increase of market share of seven times in a short span of five years has brought us to the point that in 1970, one out of every six color television sets sold in the total U.S. market—a market which doubled between 1965 and 1970—was imported.

Obviously, this continuously increasing flood of imports has had an extremely adverse effect on our balance of trade. In 1969, the balance of trade in consumer electronic products was a negative 890 million dollars, while in 1970 this deficit rose to over 1 billion 75 million dollars. United States consumer electronic exports were only approximately 77 million dollars. Actually, the deficit is even greater since the value of imports is understated in that they are valued f.o.b. country of origin and do not include freight, duty and insurance. In 1970 the U.S. consumer electronics market reached 4 billion 69 million dollars and, even on an understated dollar basis, imports captured over one-fourth of the total U.S. market.

Since the beginning of the Japanese invasion into the U.S. consumer electronics market, many American manufacturers, fighting to survive, were forced by this competition first to purchase components from Japanese sources and, when this measure proved insufficient, to make or procure their sets in Japan, Hong Kong, Taiwan, and now Mexico. An alarming movement of American plants to Asia has taken place. Hong Kong, Taiwan and Mexico, providing incentives including cheap labor, have become the new sites of many former American based factories. This trend for survival by moving American plants out of our country is continuing at an alarming rate. Although we have never purchased television sets offshore, even in the face of the great invasion of Japanese television receivers over the years, Zenith also was forced to open a large new plant in Taiwan two months ago in which we may ultimately employ several thousand people.

In 1971, Zenith's average employment in the United States is forecast to be down by approximately 5 thousand jobs compared to our average employment in 1968. This is in large part due to the competitive necessity of making, or having made offshore, products which we had planned to produce here in the United States. If we considered the loss of employment in our television receiver manufacturing operations alone for the same period, the number of lost jobs would be significantly greater. Department of Labor figures show that between October 1966 and October 1969, there was a loss of 20 thousand 3 hundred jobs in manufacturing radios and TV receivers in the United States, and between October 1969 and November 1970 there was a further loss of 27 thousand 4 hundred jobs for a total loss of such jobs during these four years of 47 thousand 7 hundred.

What has happened in the finished goods end of our industry has also, of course, had a substantial impact on the even larger labor force engaged in the components industry—on the people who make coils, picture tubes, speakers, tuners and the like. Most of these companies have also established offshore facilities in the low labor cost countries of Hong Kong, Taiwan and Korea in order to support runaway set production.

One of the most distressing aspects of Zenith's reduction of work force as a result of imports is its impact upon our program for providing training and employment opportunities for the unemployed and under-employed drawn largely from minority groups in the Chicago area. In the last several years, we have invested a great deal of money and time and effort to recruit and train members of such minorities as blacks, Puerto Ricans, Mexicans and Cubans from the Chicago area, to the point where they represented a large and significant portion of our total employment.

In addition to our own financial investment, we have carried out government contracts for training and employing the chronically unemployed and underemployed. This has resulted in our giving good jobs to several thousand members of minority groups, who developed pride in their work and in having the kind of economic opportunity that would permit them to raise substantially their standard of living. The loss of jobs resulting from imports has fallen heaviest upon the most recently added people in our work force who, for the most part, are non-whites. This is required under union rules, and I do not known [*sic*] any other way to reduce our work force under such conditions, even if we did not have such rules.

PAST TRADE POLICY

The U.S. has been for many years a world leader in efforts to achieve reciprocal trade between the developed nations, with a minimum of commercial burdens by way of tariffs, commercial red tape and all the other non-tariff barriers to trade. As you are well aware, we are signatories to the General Agreement on Tariffs and Trade, and have taken the leadership over the past twenty-odd years in reducing our own tariffs and other trade barriers into the U.S., purportedly receiving reciprocal undertakings on the part of the other great trading nations.

Over the years, these GATT agreements have provided for substantial reductions in U.S. tariffs on consumer elec-

tronic products. We have purportedly secured corresponding reductions in tariffs on U.S. electronic products imported into highly developed industrial countries such as Japan. Unfortunately, we seem to have a peculiar American tendency not to fare very well in negotiating international agreements. As Will Rogers said, we have never lost a war nor won a conference. The fact is that while our GATT arrangements have opened up the U.S. markets to imports on a large scale, we are still left with systematic discrimination against American consumer electronics throughout most of the world, with high tariffs and a whole host of non-tariff barriers which, separately or in combination, prevent any effective U.S. export competition.

Let us see what kind of reciprocal trade policy regarding tariffs the U.S. established with Japan under GATT's "Kennedy Round" which is now in effect. From 1968 to 1972 U.S. import tariffs on imported TV sets were to be reduced from ten to five percent at the rate of one percent per year. During the same period the Japanese duty on imported sets was to be reduced from 24 percent to 15 percent. Forgetting for the moment about the fact that the U.S. duties are based upon an f.o.b., Japan price while the Japanese duty is based upon a c.i.f., landed price, thereby making the effective Japanese rates even higher, at the end of the Kennedy Round we were left with about a three to one ratio between Japanese and U.S. tariffs on imported television sets.

During my testimony before the House Ways and Means hearings on international trade in June of last year, we suggested that perhaps instead of import quotas, the interests of the U.S. would best be served by a moderate upward revision of tariffs on consumer electronics. We could see no reason why our Japanese friends should complain if our tariffs were partly equalized by raising them to those of Japan. How did the Japanese respond to such a suggestion? The August 6, 1970 issue of *The Japan Eco-*

nomic Journal carried a story entitled "TV Tariff Cut Sought" containing the following introductory paragraph:

"The Electronic Industries Association of Japan has decided to appeal to the Ministry of International Trade and Industry for reduction of Japan's import tariffs on American and other foreign television sets to about the same level as the U.S. equivalents."

Subsequently, in December, the same paper contained an article stating that tariff rates were due to be slashed in April on radios, TV sets, gramaphones and record players. Rates on these items were to be uniformly cut to 7.5 percent.

While this sounds like a major step in the right direction, the fact is that 7½ percent of nothing is really no better than 18 percent of nothing, because there are no American sets on the Japanese market, and you can be sure that our Japanese friends will bend every effort to keep it that way.

JAPAN'S CLOSED MARKET

In order to support her invasion of the U.S. TV set market with the use of extremely low pricing policies, Japan has maintained a closed market to imports of television products and has fixed and kept domestic prices at artificially high levels. With a closed domestic market, insulated against foreign competition, domestic prices can be easily fixed at a high figure. It has been reported that the Fair Trade Commission in Japan recently found six of the larger Japanese TV set makers guilty of fixing retail prices in Japan and that decision coupled with the TV dumping case here in the United States appears to have the Japanese consumer quite upset for he has realized that he has been subsidizing exports to the U.S. by paying higher than necessary purchase prices, as well as higher taxes to support Government subsidies. Furthermore, according to press reports, delegates to the National Consumer Association's Convention, a group representing 20 million consumers or one-fifth of Japan's total population, meeting in Tokyo last November, decided to boycott all products sold by one of the largest Japanese set manufacturers because of its refusal to disclose its pricing structure on color television sets. At the Convention it was also decided to launch a "non-buying" campaign against color television receivers of all Japanese brands. Last March, it was reported that the boycott campaign against all of the products of that large manufacturer had been lifted in view of the fact that that company had accepted the Fair Trade Commission's charge on price fixing, apparently admitting that such practices had existed.

If the Japanese market were completely open and competitive as is the case in this country, television receivers could be manufactured in the United States and successfully sold in Japan at competitive prices. The Japanese Electronics Industry Association admits that large screen TV receivers made in the U.S. could be delivered to a Japanese importer for a total cost of about $449 even prior to the April tariff reductions. Similar large screen Japanese sets have carried list prices of from $1,200 to $1,600 in Japan. A similar large screen Zenith set with an advanced premium Chromacolor tube carries a suggested retail price of $579.95 in the U.S. A U.S. factory worker in Chicago making $3 an hour must work 193 hours to buy our large screen color set (forgetting about taxes for the moment) while a Japanese factory worker in Japan making 73 cents an hour (excluding his bonus and benefits) must work 1,860 hours, or almost ten times as long, to buy the Japanese set.

It would, therefore, appear that Japan would be a great place for U.S. TV manufacturers to sell sets, but even with the recently lowered tariffs a whole host of barriers still prevent American entry into the Japanese market. Our attempt to enter the market of several years ago was

blocked. A recent market study indicates that, while some of the barriers to our entry have theoretically eased somewhat, there are still clear-cut obstacles. Japanese government regulations still block free entry of necessary repair parts, and the Japanese are notorious for applying what they call "administrative guidance" to influence sales outlets in their handling of imported goods.

DUMPING

It has long been a well recognized principle in our law that the practice of dumping goods into the United States at prices far less than they are sold for in home or other markets is unfair and illegal. This has nothing to do with whether you are a "free trader" or "protectionist" or anything in between these polarizing terms.

The reason behind this principle is obvious. Dumping is a method of international price competition or, more properly, price discrimination between national markets which is of economic significance to both the exporting country, for example Japan, and the importing country, the U.S. Dumping is simply selling the same commodities at different prices in different markets. Dumping occurs when merchandise is imported into the U.S. and sold for less than the price for which the merchandise is sold in Japan, taking into consideration the conditions and expenses of sale. It is an undesirable method of competition because the resulting cheapness is not due to basic superiority in production efficiency in Japan.

I am sure it is clear that with a closed domestic TV market in Japan, dumping TV sets into the U.S. is an easy task since domestic prices fixed at a high figure help support dumped prices here in the U.S., and incremental costing is used for export pricing. Following a lengthy investigation, the Secretary of the Treasury announced on December 4, 1970 his determination that television receivers imported from Japan were being, or were likely to be, sold

in the United States at less than fair value as compared to sales made in Japan. The U.S. Tariff Commission then, in accordance with Federal anti-dumping law, conducted an investigation to determine whether "an industry in the United States has been or is likely to be injured" by this unfair practice, a finding necessary, under the law, before additional duties can be imposed.

After a thorough study, the Commission on March 4, 1971 unanimously ruled that ". . . the imports of television receivers from Japan, sold at less than fair value, have adversely affected the prices of comparable domestically produced receivers in the U.S. and have caused substantial loss of sales by U.S. producers." In order to correct this unfair practice, all shipments of color television receivers from Japan to the United States since September 1970 will now be examined by the Treasury Department to determine to what extent additional duties are required to be assessed. While the amount of these extra duties is not known due to the nature of the dumping proceedings and will probably vary from set to set, these findings should result in fairer TV set price competition by Japanese imports in the United States market.

SUBSIDIES

In the area of Japanese government export subsidies and incentives, there is good reason to believe that the Japanese government provides a whole host of subsidies beginning with the remission of a commodity tax and including such things as export credits, accelerated depreciation and a variety of other tax advantages and insurance against loss in export. While these bounties and grants are a little difficult to find in the original Japanese statutes, they are effectively summarized in a State Department memorandum of November 6, 1968 entitled "Japan's Export Promotion Techniques." The existence of such bounties and grants thus discloses yet another factor contributing to

Japan's success in the U.S. consumer electronic products market.

INDUSTRY GOVERNMENT COOPERATION

There is one subject that I am glad to see get increasing attention in the United States at the present time and that is the proper relationship between government and the business community in this whole area of international business and trade practices. The scheduling of this hearing itself is a further indication of the increasing interest in the trade problems of U.S. business. All of us who had any exposure to Japanese competition are immediately struck by the tremendous difference that exists between the Japanese outlook on this subject and our own. In dealing with Japanese competition or in seeking to penetrate the Japanese market, one is immediately struck by the great difficulty in discerning where Japanese business ends and the government begins. There apparently is a way by which the Japanese business community and the Japanese government arrive at some concensus of what serves best the national interests of Japan, and then both government and industry do what is necessary to carry out the program. We, on the other hand, fight among ourselves and with the government and there is probably a large feeling on the part of the business community that many people in our federal government who deal with high level negotiations on trade matters are thinking almost wholly of political and diplomatic considerations and have no real understanding of or interest in the practical day-by-day problems of business. I am sure this is not a one-way street and our government people may similarly feel that the business community is preoccupied with its problems and not sufficiently interested in the political and diplomatic headaches.

It is interesting as background to the Japanese government-industrial combination, which has sometimes been called Japan, Inc., that is [*sic*] many cases it was the government itself which fostered business enterprises as gov-

ernment functions and that private business firms were formed to take them over. It has been suggested that this may explain what still remains as an unusually close working relationship between Japanese business and government.

This brings me to a related subject. The Japanese are great pragmatists and they have an exceptional ability quickly to adapt their course of action to the realities of the situation. Despite the fact that there has been a great outcry by the Japanese on the textiles, shoes, steel and electronics issues, they have felt considerable pressure from various domestic industry sources and from their government to moderate their assaults on our market through dumping and other similar practices. But when we have widespread publicity campaigns against "protectionism" and organized efforts to stop any enactment of new laws, or against enforcing old laws, our Japanese friends are misled into thinking that American public opinion will permit them to continue dumping and similar unfair practices and that they can continue keeping a closed market to American manufactured goods with various discriminations against our products.

It is only by convincing them fully and finally that we really mean business that they will ever decide that they really must put their house in order both at home and abroad. And only this Congress and the federal government can do the convincing.

FUTURE TRADE POLICY

Up to this point, I have directed most of my remarks to telling you what our problems are. I wish I could see the answers as clearly as I see the problems.

Most of us in our industry recognize that as a long range-solution, import quotas have as many built-in problems as they would solve and I have never seen any machinery for working them out without serious risks of arbi-

trary and unfair action, not to mention the temptations of possible political corruption. I would be in favor of import quotas only as a short-range method of dealing with the situation, if it would give our government the muscle and the authority to force a rationalization of our trade with certain countries such as Japan.

I mentioned earlier that we have just opened a new plant in Taiwan. This probably will not be our last offshore plant and in the next few years, lacking some change in our Administration's trade policy, more and more of our productive facilities for serving the U.S. market will have to be located in foreign countries.

Our market studies tell us that with projected new family starts and population growth, and with the products we see immediately at hand, the consumer electronics products industry business in manufacturers sales and imports will increase from the current 4 billion dollars plus to 5 billion 5 hundred million dollars in the next five years. Projecting the increase in imports as a share of the domestic market at the rate by which they have increased over the past three years, the current 1 billion 153 million dollar import figure contributing to the massive negative trade balance in our industry alone will increase to 3½ billion dollars and represent approximately 60 percent of our industry by 1976. It is hard to believe that this can happen to a high-technology industry which has been so effective in the U.S. that it has been able to produce and sell at prices which are far below the applicable prices in any other principal country of the world despite our American wage scales.

While we are certainly pleased to see the Treasury Department active in anti-dumping matters, there is much the Secretary could and should do under another Federal statute. For some 70-odd years we have had on the books a statute which requires the Secretary of the Treasury to impose countervailing duties in the amount of any bounty

or grant which is made in connection with the import of dutiable articles into the U.S. It currently appears in Section 303 of the Tariff Act of 1930. Congress originally enacted this statute on the theory that while it was perfectly proper for domestic industries to compete in the areas of productivity, efficiency, price, and quality it was not fair to ask them to compete with foreign government subsidies. Many years ago this statute was upheld by the Supreme Court as a mandatory requirement on the Secretary.

As far as I know this section of the law had been a dead letter and the Treasury Department still has not made up its mind what its policy ought to be on countervailing duties. On two occasions over the years the Treasury Department has recommended to Congress that the countervailing duties statute be amended to limit the Secretary's duty to impose countervailing duties to cases where he found injury to a domestic industry and to completely exclude from the statute the remission of commodity taxes, a familiar device used by Japan and other nations to subsidize their exports. In each case Congress has refused to amend the statute with the result that while it leaves him no discretion the Secretary has in fact acted as if he had complete discretion.

We filed a Petition with the Secretary more than a year ago pointing out indicated areas of large direct subsidization of Japanese exports to the U.S., and I understand a countervailing duty petition by the steel industry has been pending since October 1968. I respectfully suggest that if we are not going to enforce this basic statutory principle of our foreign trade policy we must then face the burden of devising a competitive American system of export subsidies that will put us on a fair and equal footing. I really do not recommend the latter course because I do not think it is a contest we can win. Instead we should face up to the realities and enforce the law the way it is written.

In another area, the Assistant Attorney General in charge of the Antitrust Division has taken a peculiar and ambivalent position. For example, while he is closely watching for violations of the law by U.S. businessmen, he apparently has chosen to take no action against those who have dumped imports into the U.S. is [*sic*] criminal violation of Sec. 72. Title 15 of the U.S. Code which is part of the Revenue Act of 1916. The Assistant Attorney General, if anything, appears to be biased away from helping the U.S. businessman injured by imports for he has gone on record in recent testimony before the United States Tariff Commission stating that in determining forces responsible for alleged injury, he is confident that in a number of cases the role of imports will be found to have been greatly exaggerated. And he has taken no apparent note that the Japanese export TV pricing and practices in the United States through their U.S. is criminal violation of Sec. 72. Title 15 of the U.S. Code which is part and illegal under our laws as the Japanese government found their domestic pricing to be under their laws. [*Sic.*]

The foregoing are just a few of the many examples available to illustrate how U.S. trade policy can again be placed in the proper posture merely by enforcing existing U.S. law.

In the past, we have seen legislation introduced to liberalize the escape clause and adjustment assistance provisions of our tariff laws. It is difficult to believe that a solution to our complex foreign trade problems lies in such factors as adjustment assistance to workers and firms where the cost of such a program must be borne by all taxpayers and is in no way charged to the damage-causing imports and practices. At the heart of the problem is the displacement of workers, and we do not believe the answers to our problems lie in making it easier for such individuals to get relief.

In the area of new legislation, we believe it is important that limits be set on the time given to the Treasury Department to act on dumping and countervailing duty matters. We believe that if the executive branch of the government refuses to enforce the laws, then business should be given standing to enforce appropriate laws in the courts so it no longer need wait for the government to act. Along these lines, it is heartening to see legislation such as S. 1476 recently introduced by Senator Fannin for himself and others help protect American business from unfair foreign competition.

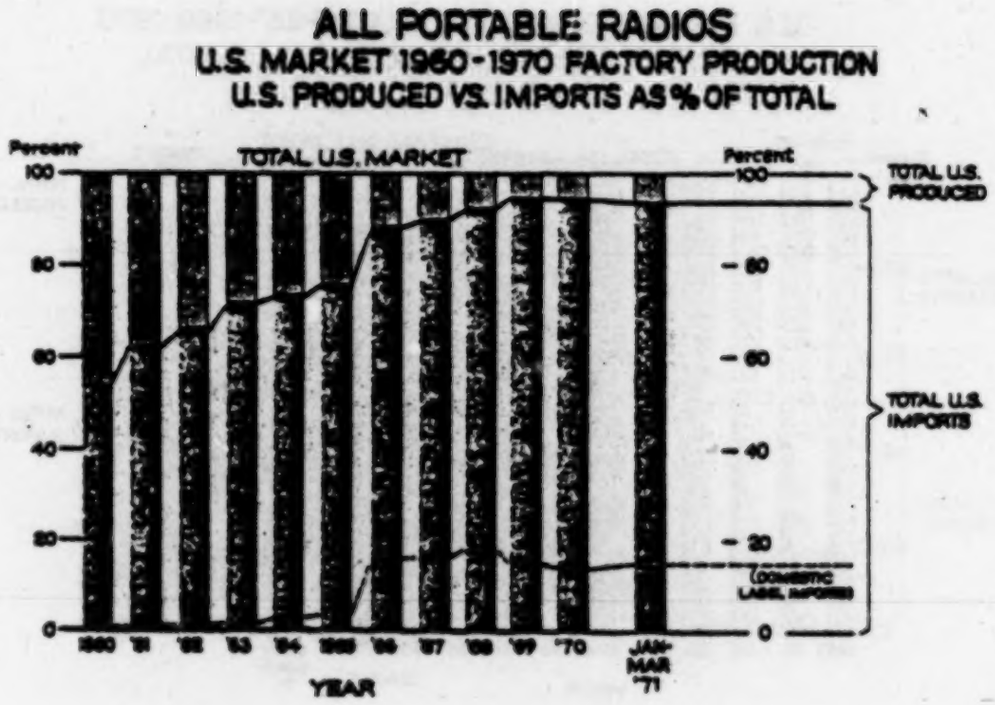
The previously mentioned Revenue Act of 1916, condemning international price discrimination injurious to competition and providing criminal sanctions as well as civil redress, apparently was intended to be a part of the antitrust laws. Senator Fannin's bill expressly declares the 1916 Act to be one of the antitrust laws as it was intended to be. As an antitrust law, the amendment would provide the government and injured persons with the remedy of injunctive relief, prescribe the statute of limitations to be tolled for injured persons during government proceedings and further encourage enforcement by business by making available government judgments and decrees as *prima facie* evidence in private suits.

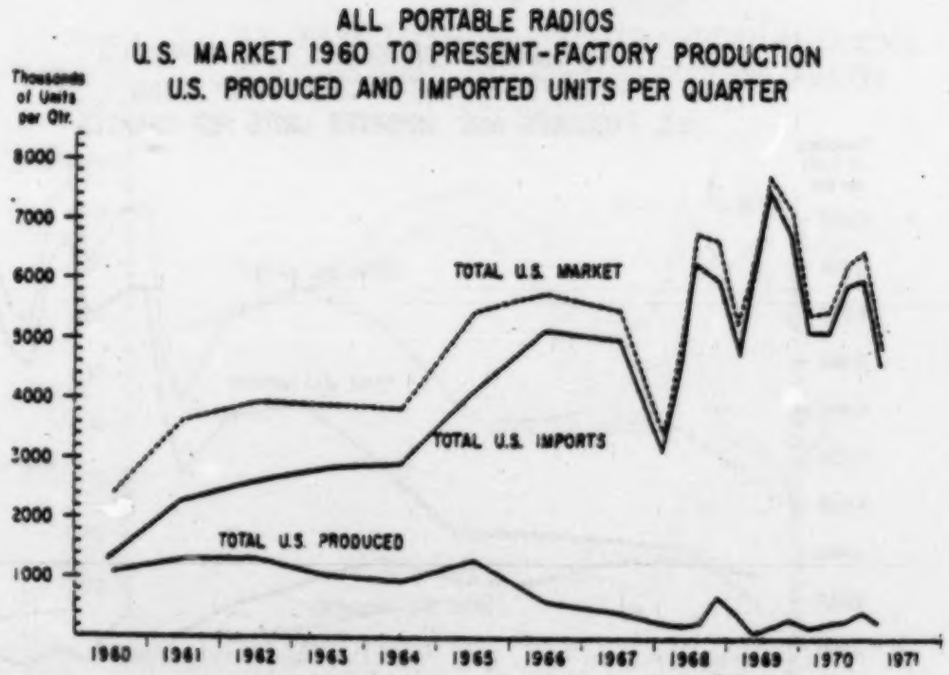
One of the most powerful aspects of the bill relates to gathering the necessary evidence which appears to be the biggest bottleneck in enforcing anti-dumping laws. With the amendment, in a suit under the 1916 Act, failure to comply with requests for evidence would result in the withholding of imports alleged to be dumped until there is compliance with the court's request. This provision would certainly speed up determination of the case thereby reducing the extent of injury to American business. With these amendments to the 1916 Act, injured U.S. industries would not have to wait for the government to act since they would have a new, effective weapon with which to fight unfair import competition.

CONCLUSION

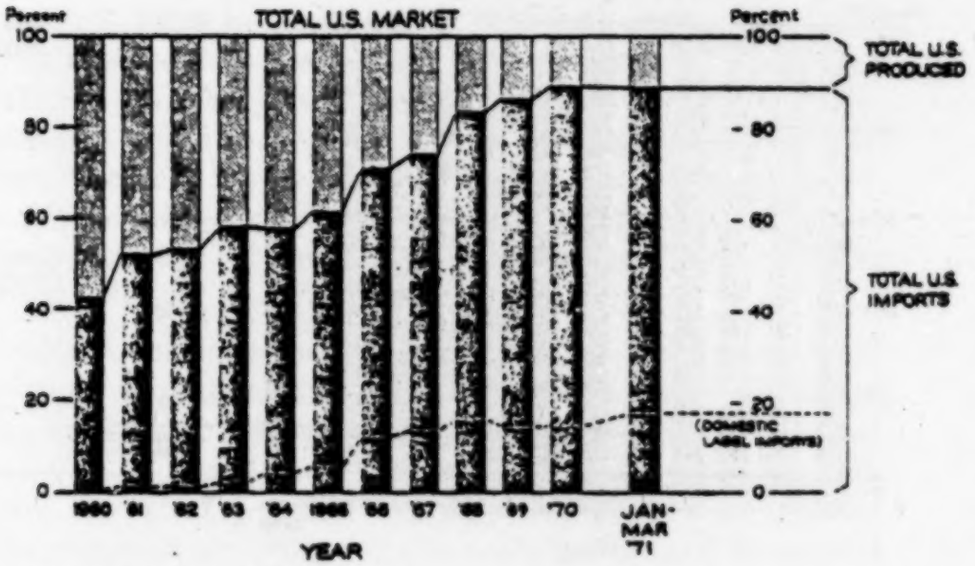
Traditionally, the United States has opened its doors to the trade of the world. We have a challenge in our industries and in our government to be as hard-nosed and practical in dealing with our trade problems as our trading partners have been. If we do that and insist that trade with our trading partners to [*sic*] be put on a reciprocal, rational and fair basis, then our industries with their tremendous resources of engineering and technology, of production and of marketing know-how will compete effectively both here and abroad, and despite the very obvious advantages that are inherent in such factors as the much lower wage levels of the Far East.

May I conclude by saying that we are most encouraged by the recognition of the members of this Subcommittee of the need for a re-evaluation of the competitive position of the U.S. in world trade. Hopefully, your investigation will have a salutary effect on those government agencies charged with carrying out our trade policy and through it the Congress and the public can be made more aware of our nation's trade policies and their impact on our economic well-being.



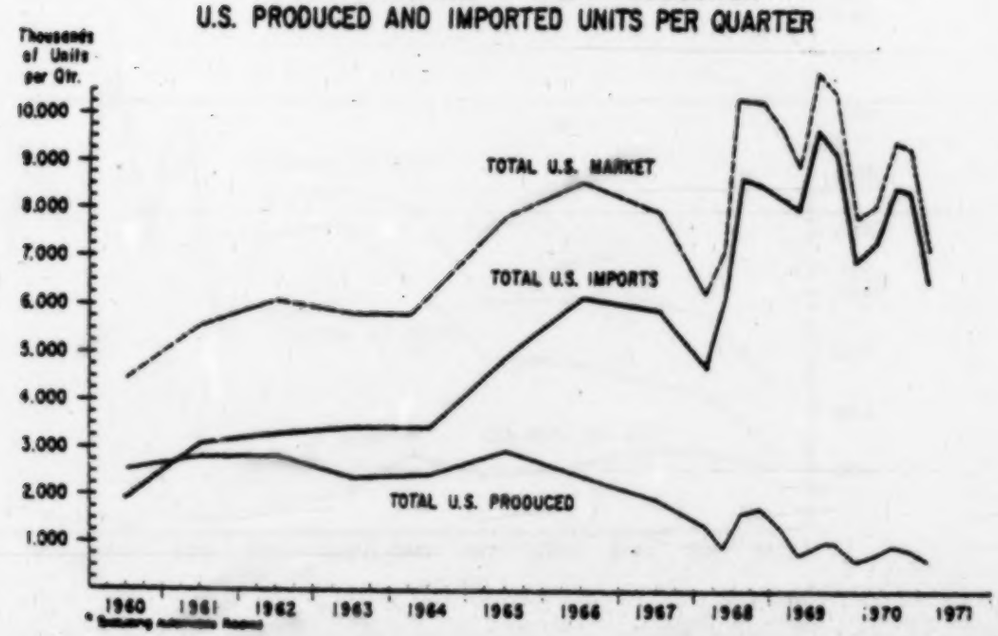


U.S. MARKET FOR RADIOS - ALL TYPES* - 1960-1970
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL FACTORY PRODUCTION



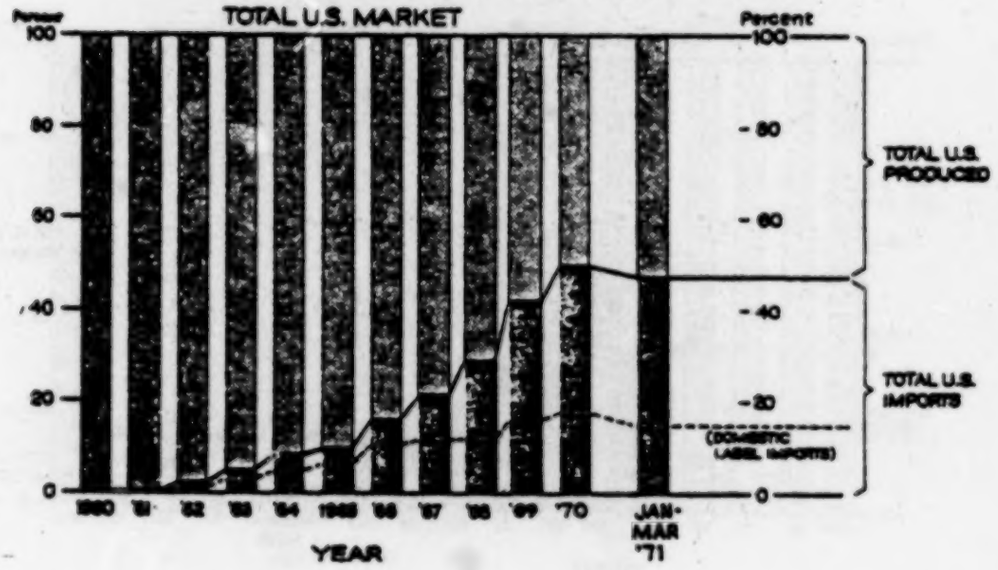
* Excludes Automobile Radios

U.S. MARKET FOR RADIOS - ALL TYPES*
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER

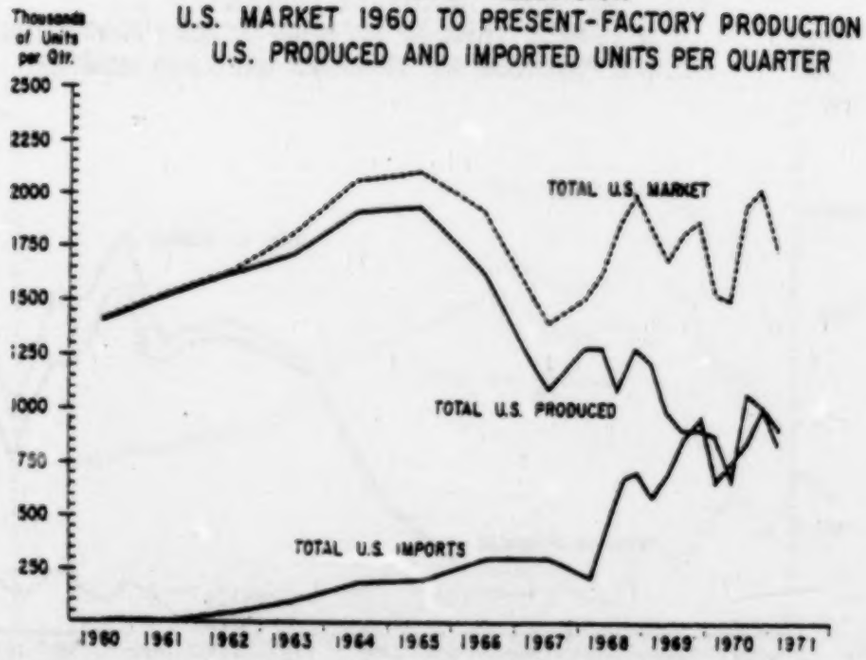


* Excluding Automobile Radios

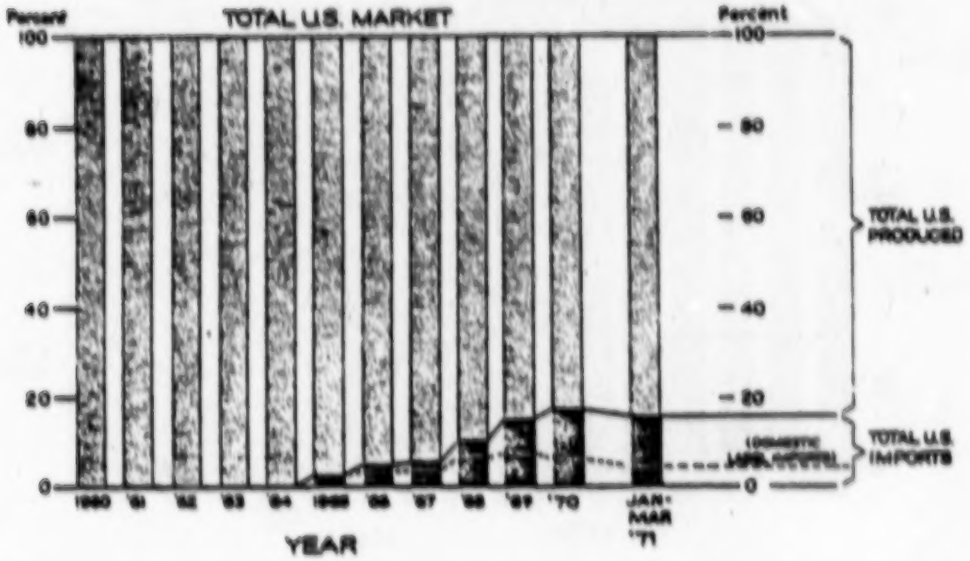
B/W TELEVISION
U.S. MARKET 1960-1970 FACTORY PRODUCTION
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL



B/W TELEVISION
U.S. MARKET 1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



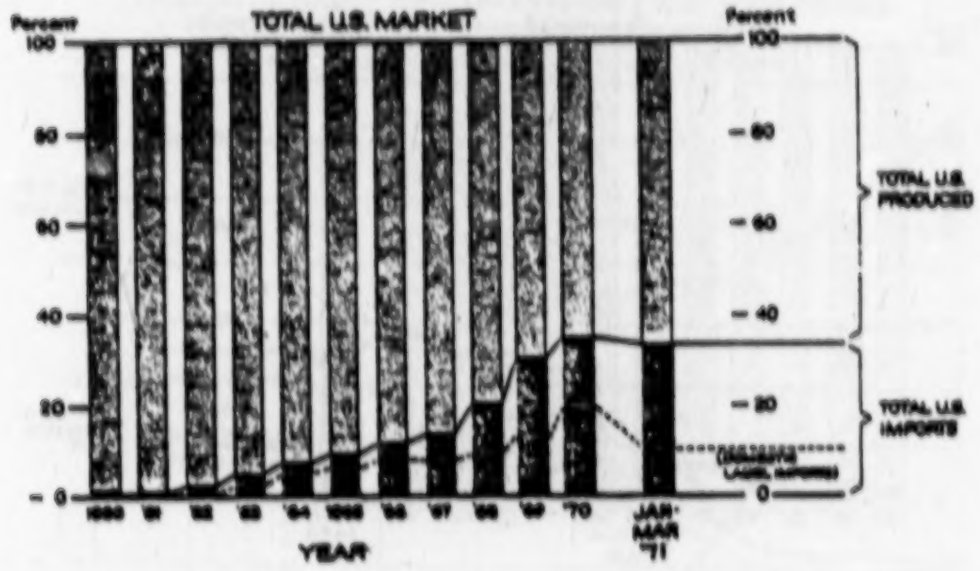
COLOR TELEVISION
U.S. MARKET 1960-1970 FACTORY PRODUCTION
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL



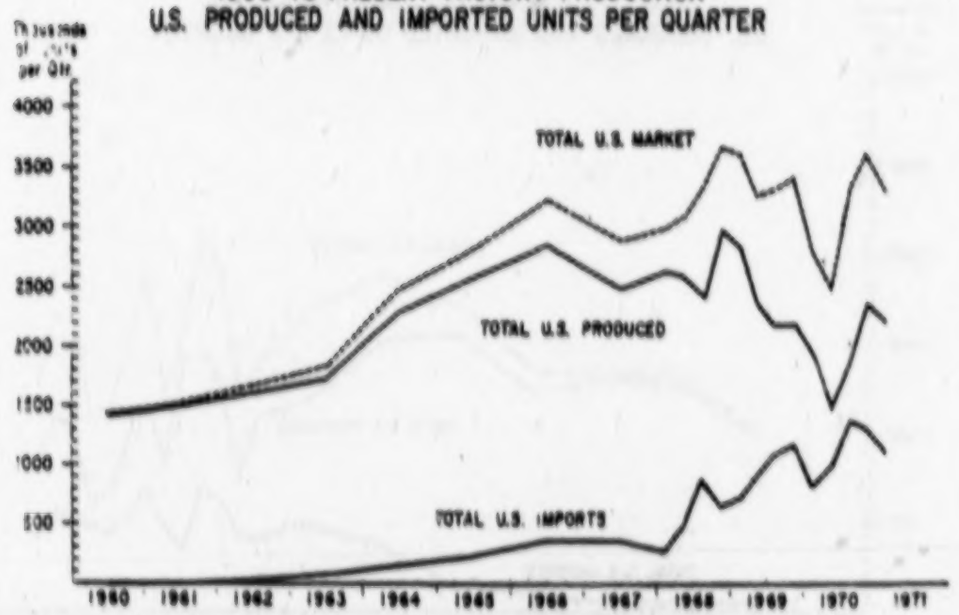
COLOR TELEVISION
U.S. MARKET 1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



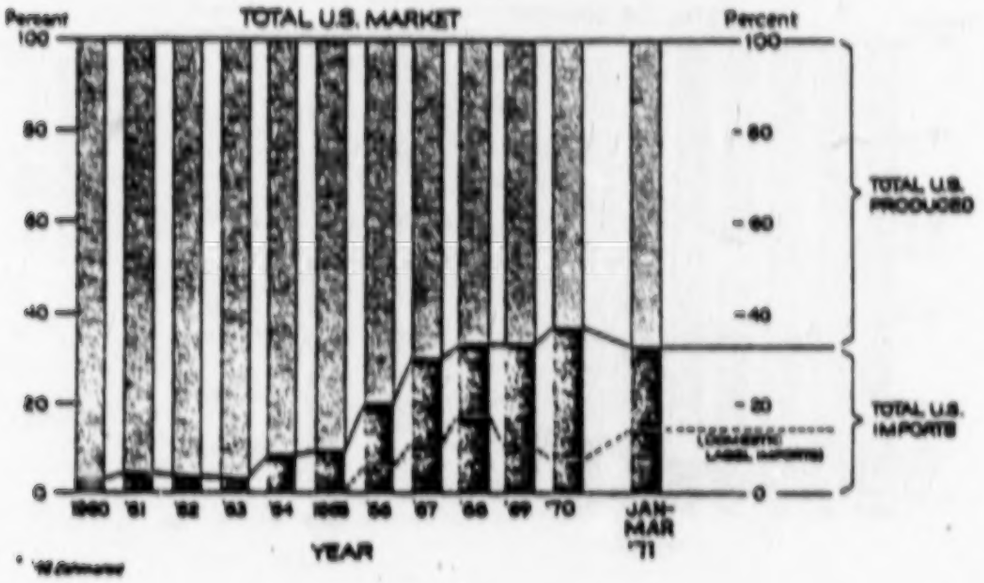
U.S. MARKET FOR TELEVISION - COLOR & B/W - 1960-1970
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL FACTORY PRODUCTION



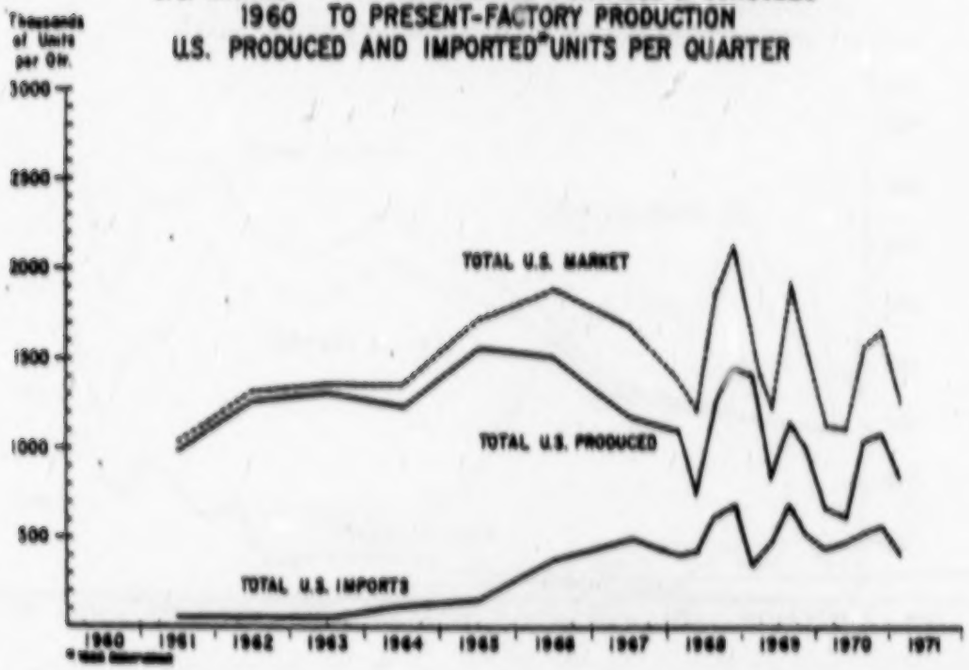
U.S. MARKET FOR TELEVISION - COLOR AND B/W
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



U.S. MARKET FOR PHONOGRAPHS - PORTABLE & CONSOLE - 1960-1970
U.S. PRODUCED VS. IMPORTS* AS % OF TOTAL FACTORY PRODUCTION

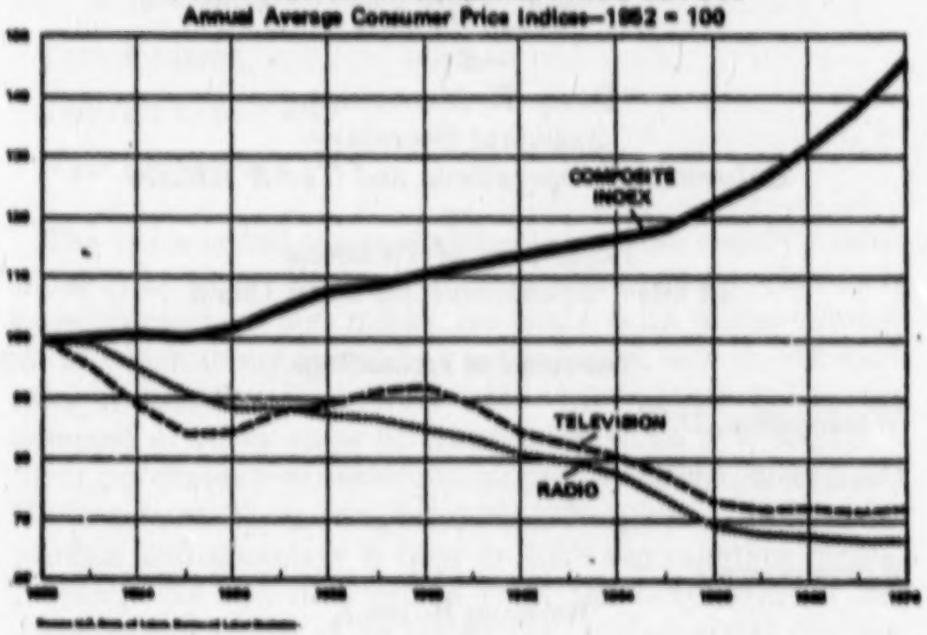


U.S. MARKET FOR PHONOGRAPHS-PORTABLE & CONSOLES
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED* UNITS PER QUARTER



TRENDS IN RADIO AND TELEVISION CONSUMER PRICES COMPARED WITH GENERAL PRICE LEVELS

Annual Average Consumer Price Indices—1952 = 100



UNITED STATES CUSTOMS COURT

[Exhibit 4 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

UNITED STATES DEPARTMENT OF THE TREASURY
OFFICE OF THE SECRETARY

Press Briefing
—By—
DAVID R. MACDONALD
Assistant Secretary
Enforcement Operations and Tariff Affairs
on
Rejections of Petitions
In Steel Countervailing Duty Cases

Transcript of Proceedings

Washington, D.C.

October 20, 1975

* * * * *

PARTICIPANTS:

RICHARD B. SELF,
Acting Director,
Office of Tariff Affairs

and

MEMBERS OF THE PRESS

[2] Secretary Macdonald: Good morning. My name is David Macdonald. I am Assistant Secretary for Enforcement Operations and Tariff Affairs for the Treasury Department.

To my left is Dick Self, who is Acting Director of the Office of Tariff Affairs.

We are announcing today—as you can see—that we have rejected the petitions of the U.S. Steel Corporation which alleged that the remission of the value-added tax on ex-

ports by seven E.C. Countries constitutes a "bounty" or "grant" within the meaning of the Countervailing Duty Law.

Before I go any further, I think it might be good for those of you, who are not immersed in this subject every day, to just quickly review these terms:

Direct taxes;

Indirect taxes; and

Value-added tax.

The value-added tax can probably be most closely analagized [*sic*] to our State sales taxes. It is an excise tax on a sales transaction but, unlike our State sales taxes—almost all of which to my knowledge are assessed only on the *final* sales transaction to the *consumer*—the value-added tax is assessed at *every stage* of transfer. So that, if a manufacturer purchases raw materials, he pays a tax to his supplier. He then turns those raw materials into a semi- [3] finished product and transfers it then to, let's say, another manufacturer. *He* will then collect from the next stage in the distribution line, a value added tax, taking credit for the prior tax that he has paid, and so on up the line—each stage collecting the tax until, finally, when the final product is sold to the Consumer, the tax is collected by the seller and remitted to the Government.

This tax is, *upon exports, not* collected; and this is the sense of the U.S. Steel petitions—that the distinction between collecting it for Domestic sales and not collecting it for International sales, in effect, conveys a subsidy on exports.

That is the value-added tax.

There is a distinction, in this area, that has been adopted and maintained by the Treasury Department, and that is reflected in the GATT—in our General Agreement on Tar-

iff and Trade—between "direct" taxes and "indirect" taxes.

Direct taxes are those taxes which, theoretically, are imposed directly upon the tax-paying entity, such as an income tax, or Labor/related type taxes like the FICA.

Things like that.

Indirect taxes are assessed on the transaction, such as a sales tax or a commodity excise tax, so that the transaction itself gives rise to the tax.

Now, the GATT provides that the remission of [4] indirect taxes, under certain circumstances—such as occurs here in the value-added tax situation—does not result; it is not to be deemed a subsidy; whereas the remission of direct taxes —that is to say, if we were to forgive corporate income tax, depending upon its exports—then that would, indeed, be deemed to be a subsidy.

The Treasury Department has consistently followed this distinction and has, in the past, countervailed against the remission of *direct* taxes.

Okay! Having made that distinction, I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition filed by U.S. Steel, it was their economic argument that, *in fact*, there should be no distinction between direct and indirect taxes.

We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because the distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.

Okay. Any questions?

Member of the Press: What about Court actions of [5] U.S. Steel, which are possible?

I understand that there are two Court decisions—of 1903 and 1907.

Secretary Macdonald: Yes, there are two; correct!

There are two ancient Supreme Court cases—*Nicholas* and *Downs*—in which the Supreme Court stated—this is going back to, I believe, the first and second decades of the 20th Century, in which the Supreme Court stated that the remission of indirect taxes on Russian sugar and of some other product that I cannot think of right now, did, indeed, constitute a bounty or grant.

If the same question were raised before the Supreme Court, *today*, it is our opinion—and this is why we decided the case the way we did—that the Supreme Court would decide the other way, in the light of all of the history and the economic changes that have gone on, up to this time, in a long period of, in essence, acquiescence in the Treasury Department's manner of handling this.

Also, I won't go into the question of whether those Supreme Court cases were holding, or *dicta*. There is some question as to whether these statements *were* holdings, or dicta.

Member of the Press: What is a "dicta"?

Secretary Macdonald: Well, a "holding" is: You say something that is *essential* to your decision.

Then you may go on, in your opinion: "By the way, [6] *this*, also, would be true."

You see what I mean?

That is a *dicta*, and *it* is entitled to less weight—under Anglo-American jurisprudence.

Member of the Press: Is U.S. Steel going to appeal your decision?

If so, which Court would it go into?

Secretary Macdonald: It would go into the Customs' Court.

In answer to your *first* question: I don't *know,* but it would not surprise me.

Member of the Press: Why did Treasury wait so many years to make this decision rather quickly, since they had only gotten the petition a month or so ago; when there is a petition pending since 1968?

Secretary Macdonald: Well, the petition in 1968 was about to be acted upon by the Treasury Department when it was withdrawn.

Member of the Press: Why did it wait so many years? Six or seven years?

Secretary Macdonald. Why did it wait so many years? You have to ask the people who were around the Treasury Department at that time—why they waited so many years. I don't know.

Needless to say, when you have a petition like that [7] pending—we have been addressing ourselves to this issue for a long time—there is also another aspect to this.

This is not, in our view, an entirely novel question. We have had similar questions presented to us not as, perhaps, broadly presented to us as presented in the U.S. Steel case; but we have taken a consistent position in at least three or four cases that I am aware of, since I have been Assistant Secretary.

Member of the Press: After doing this, are you going to make any suggestions to Ambassador Dent on the upcoming negotiations concerning indirect or direct taxes?

Secretary MacDonald: Yes. Ambassador Dent is well aware of this problem, and we participate, internally with him, on questions of where the United States should be going—from a policy standpoint.

Member of the Press: Is the Treasury now tinkering with changing the direct and indirect, and considering it as one?

Secretary Macdonald: I think it is fair to say that the United States Government is in favor of changing it.

Member of the Press: Did the petition that U.S. Steel filed contain any other export subsidy allegations—other than the value-added tax—such as low interest loans or special loans, or Government payments?

Secretary Macdonald: No. It did not.

Member of the Press: Would you confirm reports that [8] you disclosed this decision last week to the European Government?

Secretary Macdonald: Yes. That is confirmed.

We also disclosed it to U.S. Steel.

Member of the Press: Why did you disclose it to the Company and to the Countries without disclosing it publicly, first?

Secretary Macdonald: Well, we felt that we ought to let them know just before we disclosed it to the Public—to see if they had any last minute arguments that we had not dealt with—you know, had not thought of.

Member of the Press: Because U.S. Steel is a publicly owned company, would this not cause problems, perhaps, with "insider information?"

Secretary Macdonald: I had not even thought of that! I had not even thought of that.

Member of the Press: It doesn't look like the stock waivered much during the week, but it seems to me that there is a question there.

Secretary Macdonald: You may be right!

Member of the Press: Does this decision bear in any way—or set any precedent that could relate to the other countervailing decisions which we still have yet to decide upon?

Secretary Macdonald: There are, undoubtedly, other countervailing decisions pending before us which either [9] allege—or might allege—the remission of indirect taxes as a bounty or grant. It is a universal practice, and one in which this Country engages, also!

Our New York State sales tax—or, at least, I know the Illinois State sales tax is remitted on the export of products from Illinois.

I believe, also, excise taxes that we have on alcohol beverages are remitted on exports. They are not assessed by this Country. This is not an uncommon practice.

Member of the Press: The point I am getting to is this: If it is so usual to take this position on a direct tax, then why has U.S. Steel made an issue of the whole thing over again this time?

Secretary Macdonald: Well, I think that they felt—I cannot speak for them and perhaps I should not—but I can only say generally, that whenever you feel that a practice does not comport with the law, there is certainly nothing wrong with urging a different result in the face of all of the precedents that are facing you.

In 1853, Abraham Lincoln was criticized soundly for rejecting the *Dred Scott* decision. He was appealing, presumably, to the wisdom of future generations to correct that decision.

Member of the Press: The point that I am trying to get to, is this:

[10] Isn't it a fact, under the reason why they did it, it is because of the new safeguards provided in the Trade Bill —the Trade Act?

I am wondering whether your decision in this case coupled with the remarks which Ambassador Dent made in Hot Springs in a Business Council last week, don't really mean that the Administration is conspiring to mitigate these events as far as it can in the forum of the M.T.N.?

Secretary Macdonald: Mitigate what events?

Member of the Press: To mitigate the new rights to protection as they are given in the Trade Bill.

Secretary Macdonald: No. I would deny that! I think that it is pretty obvious that that is *not true*!

I am sorry I cannot present you with intrigue, personality conflict, cover-up, scandal, etc., but I am afraid that you will find—in this particular case—that it is a question of your Government operating as best it can to apply law that it finds—having had it handed down to it by the Legislative authority—in the interest of the common weal.

I realize that it does not make good writing, but I think that is the case.

Member of the Press: It remains a fact, surely, still, that demands for protection are running at record level——

Secretary Macdonald: I can't agree with that statement at all! What?

[11] Member of the Press: —following the passage of that Bill.

Secretary Macdonald: It depends on how you define "protection".

Well, I don't find, myself, that the demand to be free of subsidized competition, or price-discriminatory competition, is equivalent to a demand for protection.

Protection, to me, is something other than that—but there is no inconsistancy [*sic*] between Fair Trade and Free Trade.

Member of the Press: Had you found the other way in this case, did you have indications from the EEC Countries on what their reactions might be—in terms of trade barriers?

Secretary Macdonald: Well, we had the usual presentations. Is this what you are saying? The usual presentations made to use through all sources, advising us of all sorts of consequences?

Yes, we have had the usual situation there.

Once again, we just try to decide the cases as we get them.

Member of the Press: Dave, with this particular use out of the way—at least temporarily—there have been recurring reports that a whole bunch of Steel Dumping Cases are going to land on you again.

Can you tell us about that?

[12] Secretary Macdonald: I cannot really give you anything—authoratively [*sic*]. I have not heard anything firsthand.

Member of the Press: You don't have a Steel Dumping Case now?

Secretary Macdonald: No, we do not.

Member of the Press: Is this the first instance of Treasury ruling, precisely, on the European value added tax?

Secretary Macdonald: As far as I am aware, it is. Yes!

Member of the Press: Would you say there are similar decisions on indirect taxes over the years?

Secretary Macdonald: Right!

Member of the Press: Could you give us an example?

Secretary Macdonald: "Mexican Steel"—which is a preliminary decision. It has not been finalized yet—but it gave plenty of warning for this result.

This is also another refutation—I think, Jeff—to your point.

Japanese Electronic Products: The Japanese have a commodity excise tax that was alleged to be a bounty or grant when remitted. It was determined that it was not. That, also, is a preliminary decision, isn't it?

Mr. Self: Yes, it is.

There are two Spanish cases a year ago, that are also at point. We only countervailed the over-rebated [13] internal tax which is an indirect tax. In effect, we ruled that——

Secretary Macdonald: —that the regular rebate—the "non-over" rebate—is not a bounty or grant.

Those two cases were "Spanish Footwear" and "Bottled Olives".

Member of the Press: Are there any Court cases—since the early 20th Century—that go into this question of indirect taxes?

Mr. Self: Yes. The *American Express versus the United States* (case) which involved our countervail against remission under Italian Law 639. We countervailed Steel Products under that law, and the American Express took us to Court on that, and the Court of Customs and Patent Appeals ruled, in effect, in the Treasury'sfavor.

Secretary Macdonald: I was going to say, "on other grounds"——

Mr. Self: "On other grounds"——

Secretary Macdonald: They did not reach that issue.

Mr. Self: But it does cross the Indirect Tax Issue to a certain extent.

Member of the Press: So, if U.S. Steel dcided to go to Court, this would really be, perhaps, the first case since the early 20th Century, where the Indirect Tax question has come into play?

[14] Secretary Macdonald: Except that the Customs Court, itself, in that same case—American Express—addressed itself to the issue.

Member of the Press: Are there other Countries that are outside of the EEC that use value-added taxes?

Secretary Macdonald: I believe so.

Member of the Press: Can you tell me which?

Mr. Self: Brazil does.

Member of the Press: Brazil?

Mr. Self: Yes.

Practically all European Countries have a value-added tax.

Australia has it.

Member of the Press: It is widely used, isn't it?

Mr. Self: Spain has a "turn-over" tax.

Scandinavian Countries have value-added taxes.

Member of the Press: Do you feel a sense of irony at all—that you are rejecting the U.S. Steel petition, yet you agree somewhat with the concept, with the——

Secretary Macdonald: With the economic argument that was made?

Member of the Press: Yes.

Secretary Macdonald: No. I don't feel any irony in that at all. We just try to follow the law.

[15] Member of the Press: Where, and how, Dave, are we going to get the negotiations on this question within GATT—in view of the problems that are already raised?

Secretary Macdonald: I am really not sure, Jack! I think that is a question that might better be addressed to Ambassador Dent.

Member of the Press: In your talks last week with officials of other Countries, did the Auto Dumping situation arise?

Is there anything new on that?

Secretary Macdonald: There is nothing new on it.

Obviously they, again, brought it up to us. And we obviously, again told them that this was an investigation in which our discretion was, really nil!

We just had to make the finding as to a particular fact which is the question of whether there are "sales at less than fair value."

Member of the Press: How does the clock run on that one?

When is your next deadline?

Secretary Macdonald: February 7 is the deadline—unless we extend it by reason of its being a complex case.

Member of the Press: That is to make a decision whether there are, or are not sales at less than fair value?

Secretary Macdonald: Correct!

[16] Member of the Press: You have not held appraisement?

Secretary Macdonald: No, we have not.

Member of the Press: If there is an extension, it will be for three months. Is that right?

Secretary Macdonald: Maximum!

Member of the Press: Would you expect that this would be extended?

Secretary Macdonald: I think it is really too early——

Member of the Press: Is that a decision you make—to extend it?

Secretary Macdonald: Yes.

Member of the Press: Or would the EC have to ask for the extension?

Secretary Macdonald: No! We can make *that* three-month extension ourselves.

There is another three-month extension—not the EC. The Automobile Manufacturers are parties in interest in the dumping case; and they could request a further extension of three months in order to have a Confrontation Conference.

Member of the Press: So it could be, all in all, a maximum of 12 months? Six, plus three, plus——

Secretary Macdonald: Yes. By the time the referral is actually made—over to the International Trade Commission.

[17] Member of the Press: You can't get a body election through the I.T.C.?

Secretary Macdonald: You think about the things that never dawn on me!

Member of the Press: Did you see the decision—by the Volkswagen Company—to change the prices of the Beetles, or, at least curtail the lower priced ones, as a reaction to the investigation?

Secretary Macdonald: I am not even aware of the factual basis of your question, so I really cannot answer the question.

Member of the Press: Could I just ask you: In your press release, it is customary form to say that U.S. Steel has not given enough information and allegations and so on? But you are not really saying that!

Secretary Macdonald: We are not saying that at all! Don't misunderstand. Otherwise, we would have opened an investigation.

Member of the Press: Your second paragraph in the press release says: "Mr. Macdonald said that the action he was announcing *means* that the Department has concluded that the information and allegations contained in the U.S. Steel petitions do not on their face describe a bounty or grant and are therefore insufficient to warrant initiation of formal investigations."

[18] Secretary Macdonald: Correct.

Member of the Press: In effect, what you are saying is much stronger than that! You are saying it is not a bounty or grant—*not* that it is information that U.S. Steel has provided.

Secretary Macdonald: Yes. Okay! Maybe that does require a little—

Member of the Press: Your decision is much broader.

Secretary Macdonald: I stick with that statement.

Member of the Press: It has much broader implications.

Secretary Macdonald: That statement *has* those broad "*implications.*"

Member of the Press: I see.

Secretary Macdonald: We are saying what you just said. We are saying that the facts, as far as we can see, are *undisputed*. We don't need to open an investigation in order to find out new facts. Everybody knows what the facts are! Having had this grounding of facts that everybody agrees upon, we are making a *legal determination*.

Member of the Press: That's right.

Secretary Macdonald: That is *really* what we are saying. That is *what that was intended to say*.

Member of the Press: What was the reaction of the Common Market people when they were informed of this decision?

Secretary Macdonald: Relief!

[19] (Laughter)

Member of the Press: Did they give you any threats?

Secretary Macdonald: There is constant pressure—always—coming in from *all* sides. You just have to get used to a certain noise level when you are in this particular job.

Member of the Press: Did you have Secret Service protection?

(Laughter)

Member of the Press: Thank you, Mr. Secretary.

(Whereupon, the press briefing was concluded.)

UNITED STATES CUSTOMS COURT

[Exhibit 5 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

RESTRICTED

Paris, 16th February, 1966

C/WP4(66)4

Scale 6
Or. Engl.

WORKING PARTY NO. 4 OF THE COUNCIL ON BORDER TAX ADJUSTMENTS

The United States Submission on Border Tax Adjustments

The United States Position: The United States Government believes that border tax adjustments cannot automatically be assessed to be trade neutral. Rather, they are almost certain to be export-promoting and import-restricting. We consider the assumption that indirect taxes are reflected in full in the price of products and that direct taxes are not reflected in prices at all to be an extreme one, with a whole range of alternative possibilities more likely.

The conclusion is similar to that of the O.E.C.D. experts on other tax adjustments, who met in September 1964. The experts concluded that the assumption underlying the full shifting of indirect taxes and the zero shifting of direct taxes was not realistic and that full border adjustment therefore is likely to be favourable to the balance of trade. The group of experts also agreed that shifting is more likely to occur in the case of selective excise taxes, such as the traditional revenue excises, than in the case of more general taxes. They also concluded that corporate profits

taxes were partially shifted into product prices, perhaps more so in the United States than in Europe.

The Urgency of the Situation: Whatever effect the present structure of border tax adjustments has on trade flows, the United States Government would be less concerned if it seemed probable that the status and [*sic*] would be maintained. On the contrary, however, we have recently seen significant changes and further changes appear to be in the offing. Illustrative of the prospect of a period of increased activity in the area of border tax adjustments, but by no means the sole example, are changes related to the tax harmonisation plans of the members of the European Economic Community. The German legislature, for instance, is currently considering legislation to replace its general cascade tax system with a tax on value added system.

It is important to emphasise that the United States is concerned *only* with the border tax adjustments and not with the tax harmonisation process as such. The first stage in the harmonisation of tax systems is likely to lead to an increase in the border tax adjustments of several of the E.E.C. countries because the present system employed in these countries (the cascade system) does not result in rebating or compensating for the full amount of the domestic tax levied on the product. It is universally agreed that upward movements in border tax adjustments, if unaccompanied by an increase in the actual internal tax burden, will confer trade benefits on the country making these changes.

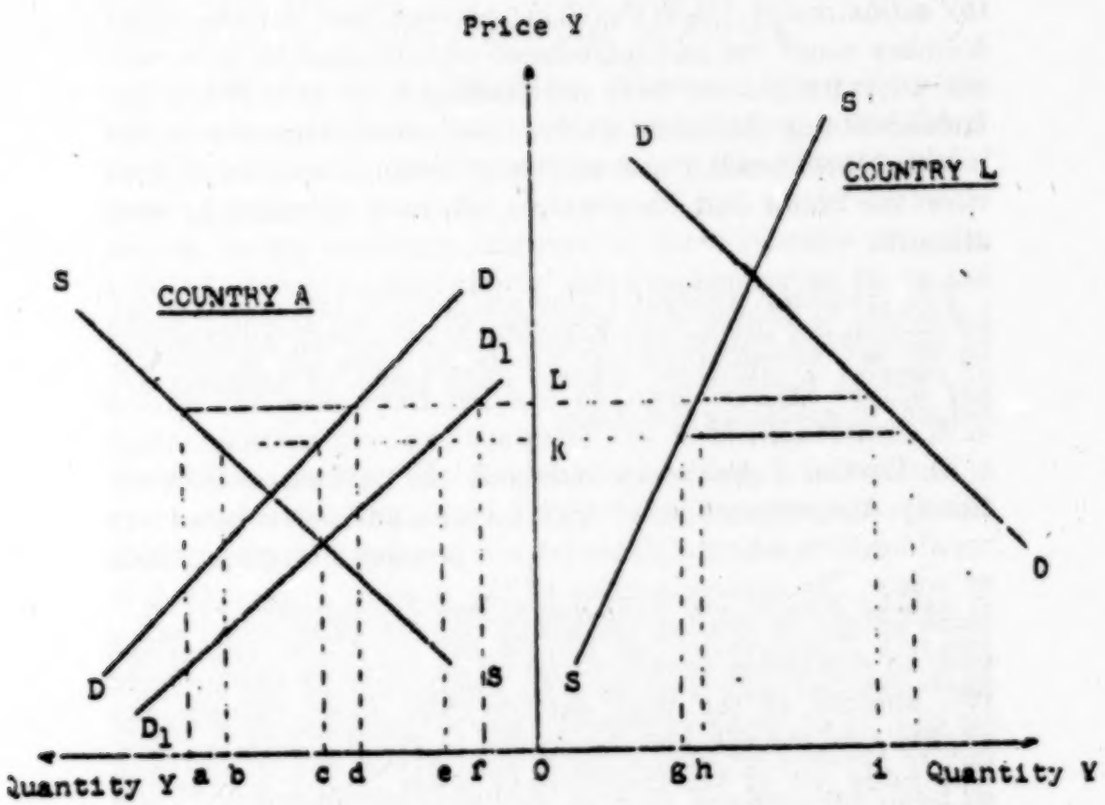
If the E.E.C. subsequently moves to a harmonisation of tax rates, application of present practices will result in further changes in border tax rates. To the extent that increases in tax rates were not fully reflected in prices, such upward movements in border tax adjustments would act as a subsidy on exports and an additional tariff on imports.

The Secretariat study of recent developments on border tax adjustments [C/WP4(65)2] showed that various other Member countries had introduced or increased their border tax adjustments, or were considering to do so. While the United States Government does not pass judgment on the internal justification and merits of these measures, it does view the trend and its possible future repercussions with concern.

Tax Shifting Analysis: The analysis of tax shifting can be considered within the framework of partial equilibrium of general equilibrium theory. Both types of analysis are helpful in assessing the issue.

A. *Partial Equilibrium Analysis:* In partial equilibrium theory, the imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. The price *net of tax* therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed commodity.

The following diagram illustrates more precisely the mechanics of the export-promoting effects of a tax. The import-inhibiting effect of border tax adjustments is not illustrated but can be demonstrated along similar lines.



The SS and DD curves indicate the supply and demand curves for a product Y produced, consumed and exported from country A and produced, consumed and imported into country B. The demand and supply curves in countries A and B have been drawn with elasticities approximately equal to 1 in the relevant area. The quantity is measured along the horizontal axis, from O to the left for country A and from O to the right for country B. Price is measured on the vertical axis and since exchange rates are assumed to remain fixed can be measured either in terms of A's or B's currency unit. Prior to the imposition of the tax country A produced Oa of Y. At the equilibrium price of Ol the market was cleared with domestic consumers buying Od

and consumers in country B (which can be considered to be the rest of the world) importing da which together with a production in B of Oh satisfied demand there of Oi (i.e., da = hi). With the imposition of a tax, domestic demand in A net of tax shifts to D_1D_1, the vertical distance between D_1D_1 and DD representing the tax payable per unit bought at various prices. The tax has no effect on supply or demand in country B since it is not collected (or is rebated) on A's export transactions. At a net of tax price of OL consumers in A are no longer willing to buy Od units now that they have to pay a tax in addition to that price. Instead they are willing to buy only Of units at that price, leaving an excess supply of fd. The excess supply causes prices to drop until supply (in both A and B) decreases sufficiently and demand (again in both A and B) increases sufficiently to again be in equilibrium. In the model the price drops to K. Country A now produces Ob, consumes Oe and exports eb of Y. Country B consumes Oj, produces Og and imports gj (which is equal to eb). As a result of the tax (and the fact that it was not levied or was refunded for exports) A's exports have increased by (ed − ba) which is equal to the increase of B's import by (gh + ij).

With respect to direct taxes, in particular the corporate profits tax, partial equilibrium analysis is also pertinent. The traditional argument is that producers do not shift the tax forward and do not affect the price paid by the consumer. This is so because producers are assumed to maximise their profits, i.e., produce at the point where the marginal revenue equals marginal costs. Both before- and after-tax profits will be maximised at this point. No matter what part of the profits are taxed away, the producer must first maximise before tax profits; this can only be done at the point MR = MC.

However, it is realistic to modify the assumption that firms maximise profits at all times for every product in the every day business world. There seems to be consider-

able evidence that many firms follow average cost pricing rather than trying to equate marginal revenue and marginal cost. For one important thing, firms usually have only an imprecise idea of the shape of the demand curve facing them and therefore have difficulty calculating marginal revenue. Under these circumstances, firms in some industries as a matter of practice set their price to cover average cost at some "standard volume" (i.e. what they estimate they are likely to sell over a given period, the estimation often being based on factors other than price) and to include a profit after taxes which is considered "normal" for the business. The profits tax thus becomes one of the costs included in the price. In other words, where it is possible to pass on the so-called direct taxes, in particular the profits tax, the entrepreneur will do so to the extent that the market permits.

B. *General Equilibrium Analysis:* While the above analysis is appropriate in dealing with selective excise taxes, examination of the effects of a general tax, falling on all or most of the output of an economy, requires consideration of the *aggregate* impact of the actions of individual firms. Theoretically there exists a wide range of possible results of the imposition of a general turnover tax. At the one extreme is the case where all prices rise by the full amount of the amount of the tax, output remains the same, border taxes are adjusted upward by the full amount of the tax, and the level of exports and imports also remains unchanged. This is the assumption underlying the claim for the neutrality of border taxes. At the other extreme is the case where the imposition of the tax does not occasion any increase in prices, border taxes are increased by the full amount of the tax, and the trade balance is improved. The extent of the resulting factor unemployment and the degree of improvement in the trade balance will be dependent on the degree of downward flexibility of factor prices and on elasticities of supply of and demand for imports and foreign supply of and demand for exports.

In the world of static general equilibrium analysis, with productivity held constant, the insertion of the sales tax "wedge" between factor returns and market price must inevitably result in increased product prices and/or decreased factor returns. Once productivity increases are introduced, however, there exists the possibility of accommodating the tax "wedge" without forcing product prices up, or factor prices down, or increasing unemployment.

This is not to suggest that the various elements could normally be expected to balance out so neatly that the introduction of a general turnover tax would exert absolutely no upward pressure on prices. But it does suggest that a significant portion of a sales tax could be absorbed by factors of production through increases in productivity.

Although in the long-run prices must cover all costs, not every increase in costs results in an increase in price. Given all the forces which play on price over time, it is not at all clear what the result will be of one single action such as the imposition of a general turnover tax. The state of aggregate demand will crucially affect the extent of tax shifting, and the response of aggregate demand to the tax is both unpredictable and heavily subject to the influence of government policy instruments. Moreover, as the various forces play themselves out over time, any pressure exerted against the upward movement of prices by a sluggishness in the rise of aggregate demand will, given full border tax adjustments, make export sales more profitable and cut into foreign exchange expenditures for imports. The very improvement of the trade balance occasioned by these circumstances will, in turn, increase domestic production and thereby reduce the pressure on government to follow expansionary domestic policies in order to avoid or reduce unemployment.

In summary, an examination of the shifting of a general turnover tax in a dynamic general equilibrium setting leads to the conclusion that a wide range of outcomes are real

possibilities. There is no *a priori* reason to assume that full or nearly full forward-shifting is the normal expectation and the burden of proof rests on those who assert that such is the case. The conclusion is that present border tax adjustment practices, the economic justification for which rests on this assumption, are arbitrary and not normally likely to be trade-neutral.

How General Are Turnover Taxes?: There is also a problem related to the generality of turnover taxes. Available information suggests that in many existing turnover tax systems there are significant areas of value output, particularly services, which are either not taxes or are taxed at a lower than average rate. To the extent this is so, expenditures are guided into the non-taxed areas. Where these non-taxed areas are objects of expenditure which do not normally enter into international trade, as services are, the effect will be export-promoting and import-inhibiting.

The United States therefore believes that this facet of the border tax problem merits further investigation and would welcome the views of those countries which now have turnover tax systems as to their generality and their effect on trade.

Other Reasons for Questioning Border Tax Adjustments: In a general equilibrium situation there are many government actions which affect prices other than changes in indirect taxes. A number of these have been previously mentioned by the United States member of the working party, such as government price support programmes, minimum wage laws, social insurance systems, immigration laws, etc. Why should there be adjustments for an indirect tax and not for some of these measures? The argument generally

put forward is that there is no way of measuring the impact of these particular kinds of factors on prices. As we have previously indicated there is also no way of determining the effect of a general indirect tax on the price of products in a general equilibrium situation. Thus we come down to a difference in the relative degree of indeterminateness. This is an argument to which no answer can be found, since the state of present day empirical statistical knowledge is such that we could not accurately determine the effect of these different elements on prices.

Apart from this particular irrationality, there is another one—that of neutralising the trade effects of fiscal measures on the revenue side but not on the expenditure side. If government expenditures reduce business costs, then it would seem equally logical to make adjustments for this kind of expenditure if we are really to seek to "neutralise" the trade effects of these fiscal measures.

In sum, the whole idea of trying to achieve tax "neutrality" in international trade is a highly questionable one. "Neutralisation" of certain kinds of taxes by border tax adjustments and "non-neutralisation" of those government expenditures associated with these taxes result in discrimination against those countries which have a lower level of government expenditures that reduce business costs. The United States probably falls in the latter category. The United States also relies to a lesser extent on those kinds of taxes for which border tax adjustments can be made under present international rules. The present system thus tends to discriminate against the United States to some extent. However, much of this discrimination may have been offset in large part over many years by adjustments in exchange rates, differential rates of inflation, and by other economic factors. This is a strong argument for continuing the status quo of the existing level of border tax adjustments. The United States Government is thus seriously concerned mainly with the trade effects of future changes in border tax adjustments.

Conclusions: The United States would therefore like to reach agreement with the other members of the O.E.C.D. that the full use of border tax adjustments permissible under current interpretations of international rules is not necessarily trade-neutral. Permissible changes in border tax adjustments therefore should not necessarily be made automatically with every change in domestic taxes. Rather, they should be subject to additional policy considerations. How such additional considerations can be brought to bear is one of the problems the United States would like to explore further in the working party.

Annexes: The following annexes contain specific responses in detail to questions raised by the United Kingdom, German, French, and E.E.C. members in submissions previously made to the working party on border tax adjustments.

Annex I

United States Comments on the Note by the United Kingdom Member of the Working Party on Border Adjustments [C/WP4(65)9]

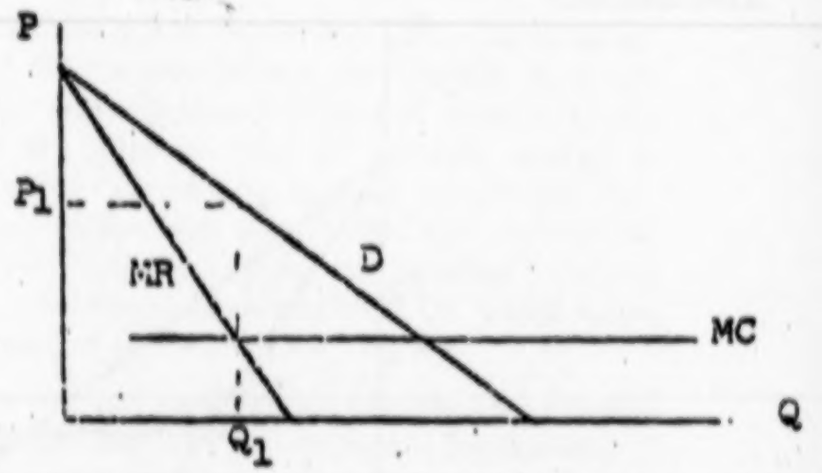
The United Kingdom paper suggests that constant and even declining costs may be more the rule in the long-run than increasing costs. This strikes us as a reasonable working hypothesis, if as appears to be the implication of the phrase, "through economies in production methods" (paragraph 11), it is assumed that technology is improved as production facilities are expanded. Constant and declining costs are then identified in the United Kingdom paper with horizontal and negatively-sloped supply curves respectively, and these in turn are shifted upward to illustrate the impact on cost of the imposition of a sales tax. The results are immediately obvious in diagrams B and C: full and greater-than-full forward shifting of the tax respectively.

Remaining for a moment within the realm of static two-variable analysis, objection must be raised to the easy

identification of cost curves and supply curves. Although they coincide in cases of perfect competition, general recognition of the predominance of various forms of imperfect competition would seem to suggest this as the more appropriate framework for the present analysis. Further we fail to see a theoretical justification for a *short-term* upward shift (paragraph 17) in a *long-term* supply curve, since we understand the latter to be defined only for a period sufficiently long for installation of new production facilities.

Although we share the reluctance of our British colleagues to press too far into economic theory (paragraph 8), several points regarding short-term shifting might usefully be illustrated by resort to a diagram slightly more elaborate than the supply-demand graphs discussed above.

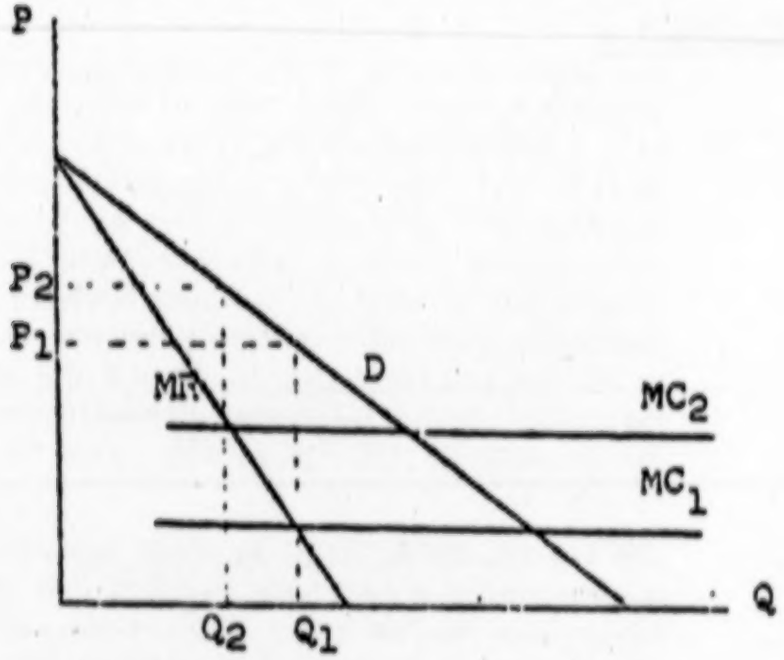
DIAGRAM A



The perfectly flat marginal cost curve (MC_1) indicates that constant marginal costs to the firm have been assumed in this case, but downward sloping demand and marginal revenue curves, the latter being appropriate to the various forms of imperfect competition. Although constant short-run marginal costs may not be an appropriate assumption if the firm is operating near capacity, this assumption helps to demonstrate that our results are not dependent on the

existence of increasing marginal costs. Making, for the time-being, the traditional profit maximisation assumption, it can be seen that the equilibrium price and quantity are P_1 and Q_1 respectively. The fact that the point on the firm's supply curve defined by the co-ordinates P_1 and Q_1 lies considerably above the marginal cost curve is consistent with the traditional tenet that firms in less than perfect markets are able to set price and output so as to maximise net revenue rather than having to accept a given market price which only covers cost. The following diagram is identical to that above, with the addition of a new marginal cost curve (MC_2) reflecting the imposition of a sales tax, the vertical distance between MC_1 and MC_2 being equal to the full amount of the tax.

DIAGRAM 3



The imposition of the tax and the consequent upward shift of the marginal cost curve dictates a new short-term

equilibrium price and output combination denated by P_2 and Q_2 respectively. It will be seen that the price rise in this instance is *half* the amount of the tax, reflecting the shape of the demand curve and the assumption of constant marginal costs. Thus the traditional analysis gives us no grounds for automatically assuming full forward-shifting.

Despite the graphic analysis above it must be conceded that the horizontal supply curve of the United Kingdom paper has some intuitive appeal even for the short-run. In fact both our experience and empirical studies tell us that firms sometimes react to changing market and cost conditions by adjusting production while maintaining the same price, i.e. businessmen are not always short-term profit maximisers in the strict sense defined by two-variable graphic analysis.

Given the difficulties a firm encounters in trying to ascertain the demand for its product over any significant range of prices and for any significant period of time, it is not surprising that the greatest part of business energy is devoted to non-price competition such as advertising, improvements in production and distribution and the myriad of other activities which come under the heading "Ceteris paribus" in the traditional price analysis, i.e. which cause shifts in the demand or cost curves.

While this has obvious implications for our own graphic analysis above, it also has crucial significance for the central United Kingdom assumption of a short-term upward shift in the supply curve, described as the "primary effect" of the imposition of a sales tax. In fact, in the absence of *a priori* reasons for judging what business reaction will be, there is a certain element of gratuity in postulating *any* immediate forward shift in the tax; must [*sic*] less is there ground for the assertion that full forward shifting is the rule.

Nor do we believe the excerpt from the Richardson Committee Report, quoted in the United Kingdom paper, lends

much support for this assertion. The testimony selected from the Richardson Committee Report that "a value-added tax would be regarded as a charge or cost and . . . businesses would *aim* to recover it in prices, either immediately *or on the next review of costs and prices*" (underlining added) is consistent with our own notion of business behaviour. We note that even this excerpt cannot be regarded as unequivocal evidence in favour of immediate, full forward-shifting of such taxes. Other portions of the Richardson Committee Report make the conditional aspect of such business decisions more explicit:

> "It would, for example, be difficult to say to an operating company making a low return that it should not increase that return by raising prices *if it thought it successfully could.*" (paragraph 269, underlining added)

> "The main qualification which witnesses made was the extent to which in some cases *competition might restrict their ability to recover a value-added tax in their prices.* But this did not alter their view of it as a cost they would aim at recovering. One company group, whose view was typical of others, put the qualification in the following way. In time of recession, it might not be possible to recover the value-added tax, but this was also true of other costs: *it was possible to recover them completely only to the extent that market conditions allowed.*" (paragraph 271, underlining added)

> "Reviewing the whole of our evidence, we are left in no doubt that although competition might in some cases restrain prices from rising and although there have been some indications recently of a changed attitude towards pricing policy and of increased resistance to price rises from buyers. The effect of the substitution would be that prices in general would rise and

> that this rise *might* quickly represent a *substantial part* of the value-added tax." (paragraph 272, underlining added).

Thus while business testimony to the Richardson Committee clearly indicates that the firms concerned would like to pass forward any new sales tax which might be imposed, it agrees that success in doing so will depend on market conditions, i.e. on the state of demand; moreover it does not lend any backing to a neat division between primary (immediate) and secondary (long-term) effects.

The influence of competition in holding down the forward-shifting of a sales tax is discussed at several points in the Richardson Committee Report, but usually exclusively in terms of the availability of substitutes for the taxed products. (For this reason, selective excises are usually imposed only on products with very inelastic demands, e.g. tobacco). The conclusion is drawn that a *general* sales or turnover tax, because it falls on all or most products, will relieve firms of anxiety they might otherwise have about raising prices to cover the costs of the tax. This conclusion ignores the fact that, within a given money income, *all* objects of income allocation are to some extent in competition with one another, and that if all prices rise, the same money income will not command the same volume of goods. Put another way, if all firms raise their prices by the amount of the tax and on the average continue to sell the same quantity, total money expenditures must have increased by the amount of revenue generated by the tax, i.e. aggregate money demand in the economy has shifted to the right. It is this implicit assumption in the arguments that general turnover taxes are fully shifted forward that we believe is particularly deserving of close examination.

The only reference to the role of aggregate demand which we have noted in the Richardson Committee's business testimony is the allusion quoted above to market conditions during a recession. Moreover it is possible for an

outsider reading the report to gather the impression that the entire consideration of forward-shifting and the effect on the trade balance took place without reference to the role of governmental monetary and fiscal policy in influencing the level of domestic aggregate demand. The implicit assumption seems to have been that monetary policy would be geared to accommodate full shifting. If so, the conclusions were largely pre-determined by this initial assumption.

If the assumption of easy monetary and fiscal policies in the face of a tax-induced rise in prices is a valid one, then the argument in favour of full forward-shifting gains considerable strength. However, we question its validity. Given the fact that an officially-sanctioned round of price increases, supported by an expensive monetary policy, would be highly susceptible to triggering further upward adjustments, and that the entire process could not help but generate severe pressure for wage increases, we find it difficult to envision responsible monetary and fiscal authorities adopting a passive attitude. (Moreover, to the extent that monetary-fiscal policy is conducive to full forward-shifting of sales taxes, it is also conducive to forward-shifting of other taxes on business, including profits taxes).

The outcome of such a process is not readily predictable. It is clear that to the extent the newly-imposed tax is not fully shifted forward into prices, while full border tax adjustments are made, export sales become more profitable relative to domestic sales than they would otherwise be. Further, imports are disadvantaged since foreign exporters either absorb part of the compensation tax in order to maintain sales (this in itself would reduce foreign exchange expenditure, thereby improving the trade balance of the country imposing the border tax), or sell at a higher price relative to competing domestic goods, thus reducing sales. The new equilibrium toward which import and export volumes tend depends, as in the traditional analysis of a devaluation, on the elasticities involved. Tying up this package with a Keynesian ribbon, it will be noted that the

increase in production of exports and import-competing goods tends to take the employment slack out of the economy which would otherwise be caused by the restrictive monetary and fiscal policy, resulting in an improved trade balance with a higher level of real savings.

It may be argued that the above picture is as open to the objection of gratuity as is the assumption of full-forward shifting. Perhaps this is so. But a central element of the United States view on border tax adjustments is that precisely because *a priori* judgments regarding the effect on prices of general sales or turnover taxes are so difficult, and the outcome so heavily subject to the influence of policy instruments, changes in border tax adjustments should not be governed entirely by an automatic rule with an extreme built-in assumption but should be additionally evaluated in the light of their trade impact.

Annex 2

United States Comments on Remarks Made by the German Member of the Working Party on Border Tax Adjustment at the 3rd Session on 20th September, 1965 [C/WP4(65)7]

The German member divided his remarks into three parts. In Part I he asserted that numerous government measures, in addition to indirect tax laws, influenced prices and, therefore, international competition. He went on to argue, however, that border taxes could not be dispensed with unless tax laws were harmonised.

In Part II of his presentation the German member examined the justification of border tax adjustments in light of existing tax structures. He noted that indirect taxes were reflected in full in cost accounting, and, therefore, more readily and fully shifted forward than other taxes.

In Part III the German member indicated that a complete system of multilateral control of border tax changes

would be impracticable. He also asserted that the motive for the planned change in the Federal Republic's tax system was the achievement of tax neutrality in domestic competition.

The United States agrees with the remark that "a number of government measures, besides indirect taxes, have an influence on prices and thus on international competition". The question arises, therefore, why indirect taxes, alone of all these measures, are automatically compensated for through border adjustments. The German member did not address himself to this fundamental question. What is the logical basis, in other words of adjusting at the border for taxes but not for other government measures which affect prices? It may also be relevant to point out in connection with this remark that arrangements have been made within the Trade Committee for prior consultation on certain measures influencing international competition so that the external effects can be adequately taken into consideration.

In examining existing tax structures the German member pointed out that the burden imposed by "direct" taxes in the various countries might not differ very much. The United States agrees with his conclusion that no need for border adjustments for direct taxes would exist if the direct tax burden and the degree of tax shifting in all countries were equal. However, it feels that further examination of the underlying assumption regarding the equality of direct tax burdens is warranted. Differences in the schedules of corporate tax rates do exist among the O.E.C.D. countries, and *effective* tax rates, which are the relevant ones for our purposes, may show greater disparities.

The German member's statement as to the close connection between cost accounting and indirect taxes neglects to consider the conditions of supply and demand in a partial equilibrium setting, or government fiscal and monetary policies in a general equilibrium setting. In a partial equi-

librium analysis the effect on prices of a tax on a single good will be influenced by the shape of the relevant supply and demand curves regardless of the "relative proximity of 'indirect taxes' to the costing process". The United Kingdom member acknowledged this point in his remarks. When a general excise tax is involved, the effect on prices should be analysed in a general equilibrium framework. The assumptions that are made regarding government fiscal and monetary policy, including the official incomes policy, will obviously affect the outcome.

The United States agrees that general excises may be imposed at varying rates and that the distinction between general and selective excises may not always be clear. In most cases, however, it is feasible to distinguish between high tax rates on a few items and relatively low rates on a great number of goods and services. In this connection a broad-based excise tax with varying rates may be considered partly general and partly selective: it may be a general excise tax at the lower rate applicable to all items and a selective excise tax at the higher rate or rates imposed on only a portion of the items.

The remarks of the German member regarding the impracticability of "a system of multilateral coatrol [*sic*]" over border adjustment seems to be based on a misunderstanding. A standstill agreement on border tax adjustments would not impede countries from changing their domestic tax laws as they saw fit. It would require only that changes in border tax adjustments attributable to new internal tax legislation be determined separately on the basis of policy considerations. This type of arrangement could be "seriously contemplated" by the United States.

The assumption underlying the German member's concluding remarks is that indirect taxes are fully shifted forward. If one agrees with this premise, then it may be true that "border adjustments serve tax neutrality purposes and not trade policy considerations". However, for the

reasons cited elsewhere the United States rejects the assumption that all indirect taxes are fully shifted into prices and no direct taxes are so shifted. Therefore, it maintains that border adjustments may serve trade policy considerations even though tax neutrality may be a major motivating force for initiating such adjustments.

Moreover, the fact that turnover taxes are not likely to be completely general, i.e., are not usually levied at the same effective rate on all value output of the economy, introduces an additional reason for affirming that border tax adjustments are not trade neutral. Since indirect taxes are frequently levied at a lower rate or not at all on services and other important components of national output not normally entering international trade, there is likely to be a favourable effect on a country's balance of payments. This arises from the price effect since domestic consumers may buy less of the taxed goods and more of the non-taxed items thus reducing imports and promoting exports.

In conclusion, the United States would like to refer to the planned change in the Federal Republic from a cascade tax to a value-added tax. The United States has no reason to question the German member's statement that the decisive motive for implementing the turnover tax reform was to achieve tax neutrality in domestic competition. We do not see, however, why changes in the general level of border tax adjustments, in addition to the internal tax changes, are essential to achieving this neutrality. Moreover, we are not convinced that the trade impact of the border tax changes should be ignored simply because this result was not the motive for the changes. Therefore, we welcome the recognition by the German member that there will be a trade effect which "will depend on whether and to what extent the Federal Republic of Germany will have availed herself of all the possibilities for making the adjustments allowed under international conventions".

Annex 3

United States Comments on the Personal Statement by the French Delegate on Border Tax Adjustments in Connection With the Value Added Tax [CWP4(65)10]

The French submission appears to admit that full forward-shifting of a general indirect tax does not necessarily take place, but given the nature of the value added tax (V.A.T.) and the limited opportunities for substitution by the consumer, full forward-shifting is the most plausible hypothesis.

However, any general price rise occasioned by full forward-shifting must be accommodated by monetary and fiscal policy. This accommodation will depend in large part on the general inflationary or deflationary situation in the economy as the authorities see it. European economies have been for some time and are today, with but one or two temporary exceptions, fully employed. It therefore seems unlikely that monetary-fiscal policy in Europe has provided in the recent past or would provide at this time the ease necessary to accommodate price rise associated with full forward-shifting. Furthermore, the policy goals of O.E.C.D. members to maintain full employment and steady growth in the context of stable prices and balance of payments equilibrium would additionally argue against the easy monetary-fiscal policy assumption underlying and necessary to the thesis of a complete forward shift of a V.A.T.

The French submission argues that the question whether full compensation for a value added tax on exports is justified can be raised only with reference to the period immediately following the introduction of the tax, since over time price structures will be influenced by other factors and it will be "arbitrary and misleading" to try to isolate the influence due to the introduction of a V.A.T. This restrictive proviso ignores the fact that the introduction of a

V.A.T., as does any adjustment in factors affecting the ultimate price of products to a consumer, e.g. changes in wages, changes in import prices, changes in the degree of competition, etc., takes time to work its way through the economy.

Annex 4

United States Comments on the Statement on Border Tax Adjustment by the Fiscal Expert of the E.E.C. Commission [C/WP4(65)8]

The United States maintains that the present system of border tax adjustment is not necessarily trade neutral, i.e. the full use of all compensating adjustment allowed by the present system will not necessarily result in neutralising the effect of differing national tax systems on the international competitive position of national industries. Except under very special circumstances under which the domestic tax is fully shifted forward, the border adjustments allowed by the present rules for some indirect taxes are not equal to the effect of these taxes on domestic prices. The present system does not even attempt to make adjustments for the effect on national competitive positions of direct taxes or for the use by governments of tax revenues (for example, for subsidising national transportation systems, etc.). The increases in border tax adjustments which countries are permitted to make when they increase those indirect taxes for which full border adjustments can be made under the present rules, thus do not necessarily neutralize the effect of the domestic tax change on their international competitive position, but instead may be export-promoting and import-inhibiting. The E.E.C. paper argues that as long as the border adjustment is no larger than the nominal rate of domestic tax for which it is made it cannot be equated to a subsidy. We do not want to enter into a dispute on terminology on this point. What is important is that, unless that tax is fully shifted forward, a full border adjustment will be export-promoting. The economics of the export-promoting effect of a tax are illustrated and explained in detail in the United States Submission, pages 2 and 3.

Even in the unlikely event that an indirect tax is fully shifted forward, an accompanying increase in border adjustment still will be export-promoting if the increase in indirect taxes for which it is made is offset by a decrease in direct taxes some of which had been shifted forward or by an increase in government expenditures some or all of which may reduce business costs. This latter case can be illustrated by the example of a government increasing indirect taxes and using the receipts to subsidise freight rates. The net effect on export prices (before border adjustments) of higher tax rates and lower freight rates might be zero, favourable or unfavourable. But nevertheless, under the present system the exporter would be automatically entitled to an increase in the border adjustment by the full amount of the tax-rate increase.

The E.E.C. paper does not deal in any detail with the question of tax-shifting, but questions whether the United States argument does not depend on the somewhat unlikely assumption of perfect competition. As we illustrate in our comments on the United Kingdom paper, it does not. It might in addition be pointed out that under conditions other than perfect competition the forward-shifting of direct taxes and particularly of the corporate profits tax is also likely to increase.

The E.E.C. paper concentrates on questions of fiscal equity and correctness. We recognise that fiscal correctness is important in assuring that, under the present system, the export-promoting effect will not be further intensified by allowing border adjustments in excess of the nominal rates of the domestic taxes involved. But we fail to see what considerations of equity will be served by insuring that domestic and foreign goods bear the same

"fiscal" burden of indirect taxes. What matters for their relative competitive position surely is the "economic" burden, i.e. the *actual effect on their price* of both all of the taxes—direct and indirect—that have been paid by those producing and consuming them and of the government activities that have been financed with the proceeds of these taxes. This economic effect depends on the extent to which various taxes—in a general equilibrium framework—are shifted forward and backward. The E.E.C. paper side-steps this problem by instead concentrating on what it calls the fiscal effect—which is equivalent to the full economic effect only if it is assumed that all direct taxes are fully shifted backward and all indirect taxes are fully shifted forward. We consider this to be highly unlikely.

Regarding the last paragraph of the E.E.C. paper, we would like to emphasise that the United States proposal to jointly examine and consider the question of border tax adjustments in the O.E.C.D. is in no way intended to "arrest the development of fiscal law and prevent several countries from carrying out the reforms and harmonisation needed in the interest of tax policy."

UNITED STATES CUSTOMS COURT

[Exhibit 6 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

Tariffs and Trade

Speaker: THE HON. JOHN R. PETTY*
Assistant Secretary for International Affairs,
United States Treasury Department, Washington

BORDER TAX ADJUSTMENTS AND GATT

Introducing my subject has been made immeasurably easier as a result of a recent article in the September-October issue of *The Canadian Tax Journal.*[1] Mr. Robert Latimer, the author, has done an admirable job in defining "The Border Tax Adjustment Question", and lucidly pointing up the issues. His article provides an added timeliness to the need I see for a discussion of this subject.

At the outset, let me say that the importance the United States attaches to the issue of border tax adjustments was signaled by President Johnson in his 1968 New Year's Day Balance of Payments Message, when he declared:

> In the Kennedy Round, we climaxed three decades of intensive effort to achieve the greatest reduction in tariff barriers in all the history of trade negotiations. Trade liberalization remains the basic policy of the United States.
>
> We must now look beyond the great success of the Kennedy Round to the problems of non-tariff barriers that pose a continued threat to the growth of world trade and to our competitive position.

---

* Although Mr. Petty was unable to attend the conference, the paper which he had prepared was submitted for inclusion in the Conference Report.

[1] Robert Latimer, "The Border Tax Adjustment Question" *The Canadian Tax Journal* (September-October 1968).

American commerce is at a disadvantage because of the tax system of some of our trading partners. Some nations give across-the-board rebates on exports which leave their port and impose special border tax charges on our goods entering their country.

International rules govern these special taxes under the General Agreement on Tariffs and Trade. These rules must be adjusted to expand international trade further.

I believe it would be useful to provide the background for this passage. First, let me review the history of the border tax adjustment problem, and then go on to bring this subject up to date by discussing the multilateral negotiations now under way in GATT.

Background

The General Agreement on Tariffs and Trade was intended to institutionalize the system of international trade, much as the International Monetary Fund was designed to provide rules and order to the international financial system. Both sprang from the desp[illegible] of war and the hopes kindled by the prospects of peace. Each has made a substantial contribution to economic growth, trade and prosperity that exceeded expectations.

However, the world of 1968 is a different world than that of 1946. New demands are now being made of these tried institutions and some are being met. We are now in the process, for instance, of amending the articles of the IMF to make provision for Special Drawing Rights which will better meet the international monetary needs of the future. A fresh look at GATT is called for, too.

Highest on the priority list for this fresh look are those provisions pertaining to border taxes. The problem, in brief, is that GATT permits member countries to provide

a full rebate for *indirect* taxes levied on their exports and to impose equivalent border taxes on imports. On the other hand, GATT prohibits any rebate or import levy for *direct* taxes.

The basic premise underlying these provisions is now being widely questioned. At one time, theorists argued that the burden or incidence of indirect taxes was *entirely* passed on to consumers, while direct taxes were *wholly* absorbed by producers. The GATT rules reflect this supposition. However, it is increasingly recognized today that this is not the case in actual practice and that as a result the border tax adjustment rules of GATT bestow trading advantages on countries which employ multi-stage indirect taxes.

History

The provisions in GATT relevant to border taxes, basically Articles II, III and XVI, are drawn from the Havana Charter of the 1940's which was intended to found the International Trade Organization. These provisions were themselves either a compromise (for example, Article XVI) or were adapted from provisions of numerous bilateral trade treaties, including especially the U.S.-Canada reciprocal trade agreement of the mid-thirties.[2] There is no unified section of GATT which deals exclusively with border taxes and it is quite clear that the provisions of GATT which cover border tax adjustments were not the product of a carefully reasoned theory, or of experience molded in the crucible of extensive usage. The lack of precise or concentrated thinking about the border tax problem is illustrated by the absence of explicit definitions of key concepts.[3]

---

[2] 49 Stat. 3960 (1936). Effective May 14, 1936.

[3] For example, the meaning of the phrase linking the import charge at the border with "charge . . . applied, directly, or indirectly, to like domestic products" was not given.

In view of the symmetry implied in border tax adjustments, an interesting historical note is that the provisions on the compensatory tax on imports and the relief of indirect taxes on exports developed quite separately. The GATT rules concerning these two elements of border tax adjustments are found in several articles of the General Agreement and in related interpretative notes and Working Party reports. The basis for the application of compensatory taxes on imports is found in Articles III:2 and II:2(a), which deal primarily with the relationship between internal taxation and imports. The provision with respect to exports is found in Article XVI, which deals with subsidies. This is hardly the handiwork of a drafter intent upon transcribing the destination principle of taxation into a permanent international agreement.

Import Tax Burdens

Article III:2 limits the imposition of internal charges on imported goods to the amount of those charges applied directly or indirectly to like domestic products. By reference to Article III:1, provision is made that such charges on imports shall not be applied "so as to afford protection to domestic production." Article II:2(a) explicitly provides that a limitation on increasing the tariff on goods bound through international agreement does not prevent the imposition or increase of compensatory border taxes.

Export Tax Relief

The 1946-47 version of Article XVI contained only a notification and consultation procedure in cases where the trade effects of subsidies are considered to be serious. It did not define subsidies or how to limit them.

It was not until the GATT Contracting Parties reviewed the various articles of the General Agreement in 1954-55 that a partially successful effort was made to answer these

two questions. In reaching partial agreement, a rule with respect to export tax relief was made by the following interpretative note:

> The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be claimed to be a subsidy.

While the focus of this change limited the definition of an export subsidy there was, however, no elimination of subsidies.[4] Instead it was agreed that there would be no introduction of new, nor extension of existing, subsidies on manufactured goods.

The long negotiation to find language to limit the use under GATT of export subsidies achieved a breakthrough in 1960 when the United States and the other industrialized countries in GATT agreed in a Declaration to cease granting export subsidies on manufactured products.[5] The Work-

---

[4] Although no attempt was made to define what was meant by duties or taxes borne by the like product, examination of the discussion at the Review Session related to Article VII (dealing with customs valuation) provides some clarification. During these discussions it was agreed that the note to Article XVI would permit the exemption from, or remission of: "Only (i) internal taxes of the kind which are levied directly on the goods exported (or directly on the materials going into the manufacture of such goods), as distinct from (ii) other taxes (income tax, etc.)".

Although this provides some guidance on the question of direct and indirect taxes, it does not indicate the status of "hidden taxes" (i.e., those not imposed on the exported product itself or on the materials incorporated in the product).

[5] The 1960 GATT Working Party on Subsidies Report stated that the governments prepared to accept this Declaration agreed that, for the purpose of the Declaration a list of certain enumerated practices "generally are to be considered as subsidies in the sense of Article XVI: 4." This Report, which contained the direct/indirect

ing Party report, which constituted the basis for the Declaration, contained a list of measures considered as forms of export subsidies. By indirection, this extended the interpretative note to Article XVI by excluding from the definition of an export subsidy the rebating or exemption of multi-stage indirect taxes. Clearly, the implications of this Declaration were not adequately considered by the United States. Part of the reason was, perhaps, due to political considerations: the United States did not want to appear to be raising obstacles to the tax harmonization objectives of the European Common Market. Nevertheless, there must have been some concern with the interpretation of this article because a special provision for review of the operation of the provisions of Article XVI were inserted at the review session. The drafters did not seem content to rely on Article XXX which provides for the review and amendment of all of the GATT articles.

Conclusions on History

This brief review of the GATT articles demonstrates that there is no consistent rationale behind the GATT rules on border tax adjustments, nor clear-cut guidance on the meaning of the GATT provisions. Articles II and III were incorporated almost in their entirety from existing practices, probably modeled after a U.S.-Canadian commercial

---

tax dichotomy in the list of practices, was adopted by the Contracting Parties, the most important representative body within the GATT organizational structure. However, the Contracting Parties provide for a review of the provisions of Article XVI. Paragraph 5 of Article XVI states: "The Contracting Parties shall review the operation of the provisions of this Article from time to time with a view of examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interest of Contracting Parties."

treaty.[a] The separate treatment of the import duties and the history of clarifying the status of export remissions confirms that no consistent consideration was given to this subject; certainly no specific economic theory was used as the underpinning for the treatment of border tax adjustments. Instead, it would appear that the matter of "border tax rules" was not even a contentious issue. Rather, these rules simply codified certain practices.

It is not surprising that the drafters of the GATT were willing to accept the *status quo*. Problems quite apart from the question of border tax adjustments demanded the attention of the drafters. In a postwar, exchange-control world, where fixed exchange rates were at best approximations of reality, concern voiced about the discrimination that would arise if the world shifted to a buyer's market would probably have been met by some retort such as "we'll worry about that problem if and when it ever arises". Little wonder! In the late 1940's and early 1950's, border tax rates were low—in the range of 2% to 4%—and limited to around one-sixth of the goods traded—and then only in the case of a few nations. Furthermore, a seller's market existed in which demand was highly unresponsive to small price variations. Finally, the $10 billion commercial trade surplus of the United States in 1947 must have had an effect on the attitude of the United States' negotiators. This is best illustrated by the then-prevalent and understandable United States' policy of deliberately encouraging a transfer of financial assets to Western Europe in order to facilitate European reconstruction.

---

[a] During the 1930's, when this treaty was written, exchange rates fluctuated. There was probably little concern about the price effect of the import adjustment as such effects would be absorbed by exchange rate changes.

1953 OEEC Review

As early as 1953 there began to be some recognition of the fact that border tax adjustments could create advantages for nations using them. The likelihood of this occurring tended to grow as other barriers to trade fell, and the adjustments were substantially increased. This recognition came in the Working Party on Artificial Aids to Exporters, part of the OEEC Steering Board for Trade. This Working Party discussed the posible trade-diversionary effect of the introduction of the French value-added tax. Some opposing views existed and one of the participants (and then committee chairman) offered a proposal designed to limit the distortion to trade from full tax remissions. The proposal was an attempt to reach a compromise between divergent views and to prevent a disastrous race between OEEC countries in the area of fiscal incentives. The basic provisions of the proposal were:

(1) full relief of exported goods from a single-stage indirect tax would be permitted;

(2) a *limitation* would be placed on the total amount of relief exported goods could obtain from *other forms of indirect taxes and from direct taxes.* The limit would be set as a percentage of the value of the goods at the point of export;

(3) a transition period would be established in order to permit nations to reach the common limit; and

(4) a consultation procedure would be established.

It is interesting to note that this proposal explicitly recognizes a divergence of views concerning: (a) the effects of remissions of direct and indirect taxes; (b) the difference between single-stage and multi-stage indirect taxes; and (c) the need for some limitation to these adjustments. The suggested solution presented a pragmatic and arbitrary solution to a difficult theoretical and political problem. Unfortunately, there was not enough awareness of the significance of the proposal, and the other members of the Working Party were unwilling to moderate their positions.

OECD Border Tax Consultations

In 1963, United States' concern about the trade effects of border taxes was further aroused by the decision of the member states of the EEC to harmonize their tax systems, by adopting the value-added tax (TVA). The United States' government requested the OECD to undertake a careful and comprehensive study of border tax adjustments. In making the proposal, the United States stated: "A study of this subject is particularly timely at the present moment. A number of countries which impose turnover tax adjustments at the border are contemplating changes in the level of such compensatory adjustments, others are considering a change in the method of applying the tax (e.g., a change from the cascade to a value-added type) and some countries which heretofore have not employed a general sales tax by the central government are considering introducing it . . ."

In order to create a better atmosphere in which to review border tax adjustments, the United States sought agreement in the OECD for a *standstill* (i.e., a temporary agreement not to make border tax changes). The Common Market countries opposed the idea, arguing that agreement on a standstill would interfere with their objective of attaining a harmonized tax system by 1970. They were, nevertheless, prepared to agree to a notification procedure which would keep the OECD countries informed about actual and contemplated changes in border tax adjustments. They also were prepared to agree to consultation in the OECD on these changes. This notification procedure was adopted as a second-best solution.

In 1967, at the request of the United States, an *ad hoc* group of the OECD undertook a consultation with Ger-

many on the general trade and payments effects of the German government's announced switch to a value-added tax system scheduled for January 1, 1968. A series of carefully prepared meetings followed. The discussions in this OECD group revealed a considerable difference of opinion on the effects on trade of border tax adjustments. The German delegation not only argued that the TVA was perfectly trade neutral but also that the shift from the then existing cascade-type indirect tax to a TVA system would not appreciably improve Germany's competitive position. This contention was supported by Germany's European Economic Community partners. This is curious, because during this same period three of these countries—France, Belgium, and the Netherlands—were simultaneously moving to increase the level of their own border tax adjustments *for the publicly acknowledged purpose of combating the impact on their trade of the German changeover.*[7] Ironically, the notification procedure worked best for those countries which felt no necessity for it.

[7] See for example, (a) French Finance Minister Debre's speech to the OECD Ministerial Meeting, November 30, 1967; (b) Dutch Finance Minister DeBlock, Memorandum to the Dutch Parliament, October 4, 1967; and (c) Belgian Cabinet Communiqué following their meeting at Knakke. To illustrate the nature of these comments, the following is an excerpt from DeBlock's statement:

> "They (ed.: the government) feel, however, that Dutch industries are right in fearing that they will be adversely affected as a consequence of such a change (ed: adoption of German TVA) in the situation in Germany. . . . there is sufficient reason to take legislative measures ensuring that the international competitive position of Dutch industry does not deteriorate too much."

These related actions demonstrate the tendency towards proliferation inherent in the present GATT rules. The absence of a limitation invites other countries to take similar action. In a recent official paper, the German government has in fact admitted that the changeover to the value-added tax had a substantial effect on export prices.

> ". . . in contrast to earlier Government expectations, the changeover to the value-added tax system after all turned out to favor exports from the point of view of prices. At any rate, average export prices declined by 2.2 percent from January to September."

This explicit and public recognition by Common Market governments of the trade effects of the German changeover of their indirect tax systems destroyed the German contention that the shift was of no significance to international trade.

Testimony of European businessmen further demonstrated the true picture. The Business and Advisory Committee (BIAC) to the OECD gave practical evidence of the serious limitations of the theory underlying border tax adjustments.[8] Briefly, the essence of their views was that "in a strongly competitive situation the prices obtainable—and hence the degrees of tax shifting—are substantially determined by the market itself." If this report is correctly interpreted, they hold that there are a great variety and interdependence of factors which influence tax shifting, but primary importance is attached to the market situation. Of course, if economic conditions are buoyant, there may be a greater possibility of tax shifting than in a depressed and declining economy, just as there is a greater possibility of increasing profits. It seems to me that even though it is extremely difficult, if not impossible, to measure the degree of tax shifting, it is grossly inequitable to maintain, as the GATT rules do, that indirect taxes are *always* fully shifted forward into product prices. By the same token, it is wrong to hold that no direct taxes are ever shifted—forward—to any degree. Perhaps most significant, and for the economist most difficult to measure, is the fact that today we have much more of a buyer's market than existed during World War II and immediately thereafter when the GATT rules

Ministry of Economics, *"The Necessity for Protection Against External Economic Influences"* Section 1, informal translation by U.S. Embassy, Bonn, Germany, November 29, 1968.

[8] Unpublished report dated June 1967.

were drafted. Not only is there increased competition among firms, but the freer trading world fostered by GATT advances substantially the size and number of competitors. Moreover, the development of competitive products (for example, steel and aluminum) expands the range of competition.

Mounting Concern in the U.S.

In the United States, concern about the adverse trade effects of border tax adjustments has been mounting steadily, not only in the Executive Branch of the government but in industry and the Congress as well.

Individual companies have spent considerable time and effort analyzing the effect of changes in border tax adjustments on their exports. Industry associations, such as the Manufacturing Chemists Association (MCA) and the National Association of Manufacturers (NAM), to name but two, also have taken a hard look at the problem.[9] The key Congressional committees concerned with this problem have looked into this subject. In statements recently submitted to the House Ways and Means Committee the two trade associations mentioned above pointed to the increasing awareness that United States exporters clearly face a competitive disadvantage arising from the GATT rules on border tax adjustments.[10] In another indication of concern, the Action Committee on Taxation of the National Export Expansion Council, early in 1966, expressed the view that the GATT rules on border taxes "are discriminatory against the United States"[11] and specifically called for a renegotiation of GATT.

---

[9] *The Logic of the Border Tax Mechanism*, Government Finance Division, National Association of Manufacturers, October 1965.

[10] Hearings before the Committee on Ways and Means, House of Representatives, 90th Congress, Part 10, p. 4489.

[11] *Taxation and Exports*, Action Committee of the NEEC, February 1966, p. 17.

As for America's position at intergovernmental meetings, the United States' representative to the OECD consultations on Germany repeatedly voiced concern about the trade effects of the changeovers in indirect tax systems occasioned by the European Economic Community tax harmonization. He pointed out that increases in border tax adjustments would compound the trade advantages gained by the indirect-tax countries. Moreover, he said, for a country with a large balance of payments surplus to undertake a changeover at that time was directly contrary to its responsibility to the better working of the process by which international balance of payments adjustment is achieved. The August, 1966 report of Working Party Three of the Economic Policy Committee of the OECD recognized the responsibility of balance of payments surplus countries, and on this particular issue it said:

> It was noted that on occasions when the national structure or level of indirect taxation was being reformed, the accompanying change in export rebates or import levies or other adjustments can have an impact on international trade, and that further consideration might be given to the question whether countries could undertake to take account of their prevailing balance of payments situation in deciding on the timing of such changes in "border tax" adjustments.[12]

Germany's January 1, 1968 changeover from a cascade type turnover tax with a rate averaging 4% on each turnover to a value-added tax of 10% on most commodities perhaps did more than any other single act to solidify a United States' government attitude that more equity must be

---

[12] Organization for Economic Cooperation and Development, *The Balance of Payments Adjustment Process*, A Report by Working Party 3 of the Economic Policy Committee, (Paris: OECD, 1966), pp. 23-24.

achieved in the GATT rules as they pertain to border taxes.[13]

Therefore, the United States pursued the issue in the GATT forum itself. Ambassador Roth, the President's Special Trade Representative, called attention to our serious concern over non-tariff barriers in his statement at the GATT Ministerial Meeting on November 23. These measures adversely affected our trade, and he asked GATT to press ahead and organize itself for a timely resolution of this problem. This initiative resulted in the GATT Ministerial Meeting agreeing to the formation of groups to deal with non-tariff barriers, border taxes, and subsidies and countervailing duties. It was believed that with these groups working concurrently, each at a pace suited to its own purpose, a framework conducive to achievement would be established.

On January 1, 1968, President Johnson called attention to the disadvantage to United States' trade posed by the provisions of the GATT rules on border tax levies and rebates and called for adjustment of these rules. In March of 1968, the United States reviewed the problem with the GATT Council and established the terms of reference for a Working Party to examine the problem of border tax adjustments. On April 30, this Working Party began discussions. It is now under way in its task.

GATT Negotiations

At the initial meeting of the Working Party, April 30—May 2, the United States raised three general problems which we believed should be corrected. First, the GATT border tax rules are inequitable. We questioned whether there should be any border adjustments to compensate for

[13] See U.S. Treasury Department, "Maintaining the Strength of the United States Dollar in A Strong Free World Economy" (Washington: Government Printing Office, 1968) p. 74.

differences in taxation. If there must be border adjustments, then they should be designed to equate the price effect of all taxes—direct as well as indirect. The current GATT rules on border tax practices, limiting adjustment to indirect taxes, (and then 100%) do not reflect adequately this principle.

The second general problem concerns the trade diversionary effect of changes in border adjustments; in addition, it is concerned with the relationship of the timing of such changes to the balance of payments adjustment process.

The third area of concern is the ambiguity in the present rules which allows protective national practices to be justified by interpretations that are at times self-serving. This ambiguity illustrates the need for more precise definitions and a code of practices.

Elaborating on the first general problem associated with GATT, the present border adjustment rules apply the origin principle to direct taxes and the destination principle to indirect taxes.[14] Under the destination principle products are taxed at the point of consumption. Since exported products are consumed abroad they should not pay the indirect tax that would pertain if the goods were consumed at home. Therefore, exports are relieved of the indirect tax burden. Imported goods, on the other hand, according to the destination principle, should carry the same indirect tax burden to avoid a "privileged position" over goods produced domestically. Accordingly, tax frontiers are established at the border. On the other hand, it is argued that regardless of the rate of direct taxes, the sales prices of the products are unaffected. Consequently, border adjustments would not be

[14] For a brief discussion of the destination and origin principles, see Carl S. Shoup, "Indirect and Direct Taxes and Their Influence on International Trade," a paper submitted to the House Ways and Means Committee, June 1964.

justified, even if the destination principle were employed for direct taxes, because the direct tax is presumably not passed on to the point of consumption.

In contrast, the origin principle states that goods should be taxed at the point of production; thus, border adjustments are not permitted. It is the origin principle toward which the Common Market is moving for transactions between member states. Interestingly, the Common Market decision to harmonize tax systems and eventually to adopt a common tax system was based on the desire to eliminate tax frontiers. The argument was advanced that such frontiers constitute both a psychological and a real obstacle to a truly free exchange of goods and services.

The origin principle must not be overlooked in seeking a solution to the border tax problem. Adjusting for indirect taxes means that one aspect of government policy is singled out for special treatment. There are no adjustments for a wide range of other government measures which directly affect prices. Nor are there adjustments for many forms of taxation which affect prices. Frequently, government economic policies affect private industry and trade but they are not necessarily accompanied by offsetting action. Moreover, many of the governmental services financed by indirect taxes may be provided through the private sector in other countries. To this extent, the border tax adjustment rules have an influence on the distribution of activities between the government and the private sector. This is a wholly inappropriate by-product of the GATT rules. Only in the case of indirect taxes is there an institutionalized provision for offset.

Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not

stand the test of economic reality.[15] While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports.[16] In brief, the present provisions of GATT divert trade and thereby disadvantage countries such as the United States and Canada which rely primarily on direct taxes.

Not only are the GATT rules unfair, they are illogical and unreasonable. There is a contradiction between the way in which direct taxes are treated in the provisions relating to subsidies and in the provisions relating to border tax adjustments on the import side. If the remission of direct taxes is considered a subsidy, this is presumably because it is felt that this would have an effect on the price of the exported products. But if direct taxes had an effect on price, it could be argued that adjustments should be made in respect to them at the border. Furthermore, there should be no presumptions about the administration of direct tax remissions being more difficult than indirect tax remissions and thus no additional concern about the price effects of the former due to administrative problems.

The second general problem concerns changes by a nation in its border tax adjustment practices. There are three categories of changes. (1) When the level of the indirect tax within the country and at the border is changed by the

---

[15] The material on shifting of general taxes has become quite extensive. For a review of the debate, see John F. Due, "Sales Taxation and the Consumer", *American Economic Review* (December 1963) pp. 1073-84.

[16] Stanley S. Surrey, "Implications of Tax Harmonization in the European Common Market", a speech before the National Industrial Conference Board, New York (February 1968).

same amount. Germany's 1% increase on July 1 is a case in point. (2) When the amount of adjustment at the border is different from the domestic level of the tax and this difference is "corrected". (A level of adjustment lower than the tax is "under compensation"; a higher level of adjustment is "over compensation".) Belgium's increase in border adjustments in 1967 and 1968 are examples of a country moving from "under compensation" to "full compensation". The German border tax change in November 1968 is an example of a move from "full compensation" to "under compensation". It is argued that the German change on January 1, 1968 included a few cases of "over compensation" going to "full compensation". (3) The third involves the changeover resulting from the adoption of a new type of indirect tax. Germany did this on January 1, 1968 and the Netherlands will do it a year later.

Within the three categories mentioned, changing the degree of adjustment at the border without commensurate changes in the relevant indirect tax brings about the most striking effects on trade. Other changes are considerably more difficult to measure—but frequently no less significant in their impact upon trade.

The increasing use of border adjustments suggests, however, that governments actually believe there are trade effects. In any case, changes in border tax adjustments to eliminate "under compensation" clearly have favourable trade effects on the country making the change. The increase in the export rebate and import surcharge can be looked at as having exactly the same effect as a devaluation on the trade account—it improves the competitive position of the country making the change and thereby strengthens their trade account. Such actions by a trade surplus country exacerbate the problems of countries working towards balance of payments equilibrium and are directly counter to the surplus countries' responsibilities to assist the international adjustment process.

The third general problem with the GATT border tax adjustment rules concerns the extent to which the lack of trade neutrality is aggravated by techniques used in the administration of border tax adjustments—for example, (a) the necessity of using averaging techniques to determine the amount of adjustments, as is the case in any cascade system [17]; (b) by the inclusion of secondary indirect taxes (*taxes occultes*) which are not "borne by the produce", in border adjustments; and (c) the arbitrary assumption of tax and subsidy allocation on grain sales within the European Economic Community on agricultural products. These technical determinations are left open to national judgment because of the lack of precision in the GATT rules and by the complexity of the issues. Assumptions employed by fiscal and trade technicians are not likely to err on the side of trade neutrality.

Due to the complexity of manufacturing processes, the difficulty of cost accounting and the varying tax systems of the countries making border adjustments, it is impossible to determine accurately the indirect tax actually borne by domestic goods. The "real number" is a changing number in any event—by product and in response to market factors. This is likely to be more true of a multi-stage turnover tax than a single stage retail tax. As products undergo varying stages of production, the tax burden will vary between commodities. In order to avoid the task of ascertaining the tax burden on each commodity, averages are used to determine a mean rate for a commodity class and the appropriate border adjustment. By their very nature, averages result in trade distortion as some commodities receive adjustments in excess of the domestic tax burden while other commodities are "under compensated".

---

[17] In a cascade system, the tax burden on a product depends in part on the number of transactions it undergoes. As this will vary from product to product, and even for different units of the same product, there is no single estimate of burden which can be universally applied. Therefore averages are used.

The GATT rules permit adjustment for taxes levied on or borne by goods. Although there is not much confusion about the fact that GATT, as currently drafted, classifies corporate income taxes as direct, there is controversy about the status of other taxes. Many countries adjust for taxes on such items as gasoline, general overhead expenses, capital, etc., taxes which are difficult to consider as levied on a specific product. We believe the arbitrary adjustment for such taxes, often referred to as *taxes occultes,* is contrary to the GATT rules and trade diversionary in effect.

The combination of erroneous shifting assumptions, *taxes occultes,* averaging and changes in border tax adjustments combine to make the present GATT rules far from trade neutral; in fact, they are damaging to your trade and ours.[18]

The obvious next question is, what alternatives exist which are more neutral and less discriminatory?

Approaches to Solutions

One approach that has been suggested is that the U.S. not seek a change in the GATT rules but, instead, adopt its own federal indirect tax system.

Here, I concur with Mr. Latimer's statement in his article in the *Canadian Tax Journal* which I referred to at the outset of my remarks. He said:

> The essence of the (border tax) debate is that countries should be at liberty to choose the structure and level of taxation consistent with their notions of economic growth and tax equity, without at the same time prejudicing their international trading position.[19]

---

[18] For a theoretical discussion of the trade effects of border taxes, see Richard Musgrave and Peggy Richman, "Allocation Aspects, Domestic and International", in John Due, editor, *The Role, of Direct and Indirect Taxes in the Federal Revenue System* (Princeton: Princeton University Press, 1964).

[19] *Op. cit.*, p. 409.

As a second approach, there have been some who argue that the U.S. should disregard GATT and make similar border adjustments, with or without reference to our direct taxes. GATT is too vital a multilateral institution for such a course of action to recommend itself.

A third approach involves multilateral negotiations to reduce the inequities in the present rules, while harmonizing international tax practices as they pertain to trade between nations. In the last analysis, what is needed is a sane, simple and practical way to resolve this problem. A workable set of rules can be devised and these rules could promote the objectives of GATT. Such an approach would be in the greater interests of the whole trading community in serving to avoid practices prejudicial to the trade of any contracting party.

Within this framework, the use of the origin principle in trading has definite attraction. It would eliminate an unnecessary barrier to trade, remove a discriminatory feature of the rules governing trade, and provide a consistent treatment for the trade effects of government tax and economic policy. Whatever its attractions—and I think they are many—the origin principle poses serious problems. The most prominent of these is how to implement the principle in the fixed exchange rate system we now have.

Other approaches, of course, could be based on the destination principle. However, under the present rules we have seen broadly increased uses of border tax adjustments resulting from changeovers in tax systems. The present rules have encouraged the adoption by other countries of indirect taxes permitting border tax adjustments. The proliferation of "adjustable" indirect tax changes is startling, and in trade terms frightening. Moreover, present rules provide no limit whatsoever to the degree of "adjustment" permitted for indirect taxes. If allowed to continue unrestrained, this proliferation will work to undo much of the progress towards freer international movement of goods, services and capital.

In conclusion, the GATT rules must be improved in such a way that they do not permit nations to achieve a trade benefit through the adoption of one domestic tax system over another. A pragmatic and equitable solution must emerge from the GATT negotiations now in progress. Our trading partners did not agree to a "standstill" on new border tax adjustments while the existing rules were under discussion. The result has been that adjustments have continued to mount, rewarding protectionist sponsors and arousing the envy of others who might be tempted to take similar trade restrictive actions. There is no longer time for drawn-out deliberations. The proliferation of changes and new border taxes gives great urgency to the GATT work.

UNITED STATES CUSTOMS COURT

[Exhibit 7 to Plaintiff's Reply to Defendant's Supplemental Memorandum]

April 3, 1970

The Honorable Myles J. Ambrose
Commissioner of Customs
Bureau of Customs
2100 K Street, N.W.
Washington, D.C. 20226

PETITION FOR THE LEVY OF COUNTERVAILING DUTIES

Dear Sir:

Petitioner, Zenith Radio Corporation, having good and sufficient reason to believe that bounties and grants are being paid or bestowed, directly or indirectly, upon the manufacture, production and export of dutiable merchandise, listed on the attached Exhibit A, continuously being imported into the United States in vast quantities from Japan hereby respectfully requests that the Secretary of the Treasury investigate, ascertain and determine or estimate the net amounts of each such bounty and grant and levy appropriate countervailing duties in accordance with the mandate of Section 303, Tariff Act of 1930 (19 U.S.C. 1303).

STATEMENT OF REASONS FOR PETITIONER'S BELIEF AS REQUIRED BY 19 CFR 16.24(b)

Attached hereto as Exhibit B is a copy of a Department of State memorandum under date of November 6, 1968, on the subject of "Japan's Export Promotion Techniques" briefly detailing some of the various bounties and grants which, it is submitted, are clearly encompassed by Section 303, Tariff Act of 1930.

SUMMARY OF KNOWN TAX INCENTIVES FOR EXPORTING

The following tax incentives, described briefly in Exhibit B, are currently in effect and should be countervailed as required by the countervailing duty statute.

1. *Special Depreciation Allowances*

Article 46-(2) of the Japanese Special Taxation Measures Law Relating to Exceptions to the Corporation Tax Law (1969-1970) provides that firms manufacturing and producing for export may take depreciation at a rate in excess of the regular rates for plant and equipment set out in the statutory tax rules. This measure insures a greater internal cash flow and in conjunction with the Reserve for Export Market Development described in paragraph 2 below effects very substantial tax savings as an incentive for exporters.

Pursuant to Article 46-(2), items 1 and 2 of the Special Taxation Measures Law, as of April 1, 1968, the accelerated depreciation system was geared up to permit major exporters to apply a multiplier to their export ratios. In order to participate, firms are classified as either "B" exporters or "A" exporters. To qualify as a "B" exporter, a company is required to increase the value of its exports by 1% or more over two successive accounting periods (i.e. in one six month period compared to the previous one). To qualify as an "A" exporter, a company must meet this same goal, but without its export ratio falling. Alternatively, it must show a growth in its exports equal to at least 66% of the total increase in Japan's exports in the period concerned.

2. *"The Overseas Market Cultivation Reserve."*

Article 54 of the Special Taxation Measures Law provides an advantage accompanying the provision in paragraph 1 above that permits both manufacturers and exporters to set aside a part of their gross export proceeds as reserves to develop overseas markets. The normal percentage of gross export proceeds is 0.5% for major trading companies, 1% for those with less capitalization and 1.5% for manufacturers.

The 0.5% of gross earnings that a major trading company can put into its foreign market development reserve becomes 0.65% if it qualifies as a "B" exporter and 0.8% if it qualifies as an "A" exporter. For smaller trading companies that qualify as "B" exporters, the rate becomes 1.3% and for those qualifying as "A" exporters, the rate is 1.60%. For manufacturers, the rates are multiplied to 1.95% and 2.4% respectively. These reserves are deducted from net taxable income after all business expenses. When merchandise passes from the manufacturer to an exporter, both are permitted to set up reserves based upon the same transactions.

The very favorable results produced for exporters by these incentives and subsidies are illustrated by the following example from page 6 of the State Department's memorandum, Exhibit B, attached:

In the example given, Company "Y" is a Japanese manufacturer selling only in the home market and Company "X" qualifies as an "A" exporter. The system works as follows:

	"Y"		"X"	
Gross Sales Revenue		100		100
Costs				
Material, labor, etc.	70		70	
Depreciation	10	80	19.6*	89.6
Gross profit		20		10.4
Reserve for o/seas market devel.		—		2.4**
Adjusted gross profit		20		8.0
Tax at 50%		10		4.0
Tax saving		—		6.0

* As explained above, company X gets 96% acceleration of depreciation.

** As an "A" exporter, company X can set up a reserve equal to 2.4% of gross export proceeds.

3. *Overseas Investment Loss Reserve*

To stimulate exports, Article 56 of the Special Taxation Measures Law permits Japanese firms to accumulate a fund equal to 50% of its investments abroad as a reserve against losses. As stated in the State Department memorandum, Exhibits B, at page 7, paragraph (D):

> "Because the GOJ must approve and license such investments, this incentive is allowed only when Japanese exports will be stimulated or other favorable balance of payments will be achieved."

4. *"Exceptional Rules of Taxation Respecting Overseas Transactions in Technology."*

Article 58 of the Special Taxation Measures Law provides for special deductions from taxable income for Japanese firms which have earned foreign currencies through the export of technical services, patent rights, copyrights, etc. The utilization of this law in connection with the exportation to the United States of the dutiable merchandise which is the subject of this complaint should be investigated.

5. *"Entertainment Expenses."*

Article 38, items (1) and (2) of the Special Taxation Measures Law provides preferential tax treatment of "expenses" incurred overseas in "entertaining" foreign buyers.

The use of this broad incentive in the sale and exportation to United States buyers of the subject merchandise should be investigated.

6. *Tariff Rebate to Exporters*

The customs drawback system, as indicated in paragraph (G), page 8 of the State Department memorandum, Exhibit B, is administered with respect to items selected on the basis of "what practical value their export would have

for Japan." It is submitted that this familiar area for concealed bounties and the use of the formula referred to in the State Department memorandum should be investigated.

Financial Incentives[*]

7. Japanese firms by virtue of an elaborate system of governmental financial bounties and incentives, as described in the footnote references, are able to operate on a vast scale with very high debt: equity ratios far beyond that possible in the United States or other countries. The debt component is frequently four or five times the equity. (See the analysis by James C. Abegglen in the March, 1970 edition of *Scientific American* at pages 31-37, attached hereto as Exhibit D.)

Against this background, the spread between the discount rate on export trade bills and that on commercial paper provides a strong incentive to export.

The export advance bill system together with the policy and practices of the Japan Export-Import Bank and the related financial incentives and subsidies described in Section II of the State Department memorandum are powerful subsidies clearly encompassed by our countervailing duty statute.

Export Insurance System

8. The Ministry of International Trade and Industry has described this phase of the Japanese export bounty system in a memorandum entitled "A Brief Introduction to the Export Insurance" dated November, 1966, and attached hereto as Exhibit E. The system is also described in Section III of the State Department memorandum, Exhibit B.

---

[*] A copy of a section of the Japan Foreign Trade News describing these incentives in general is attached hereto as Exhibit C. The State Department memorandum, Exhibit B, also describes these incentives in some detail at pages 8-11.

The purpose and effectiveness of this government subsidy is described by MITI itself at page one of its memorandum as follows:

> "The Government of Japan underwrites, by itself, export insurance policies to insure perils and risks which are brought about by export transactions or other overseas transactions conducted by traders and manufactures [*sic*] who are engaged in pursuit of foreign trade and production of goods for export and which are not insurable through the existent private insurance institution at present. Export insurance thus aims at protecting those concerns who are engaged in foreign trade activities and enabling them to undertake their activities without fear to bear loss by themselves.
>
> • • •
>
> "This brief pamphlet aims at sketching the whole picture of the government export insurance system which plays a useful and constructive role in export selling of international trade."

Japan External Trade Organization

9. Another most effective export subsidy is provided by the highly organized government owned corporation known as JETRO (Japanese External Trade Organization). The extremely valuable marketing research, promotion, design, advertising and other services provided by this organization are briefly described in Section IV of the State Department memorandum, Exhibit B.

Tax Credits for Research

10. Incentives in the form of tax credits for research, a function essential to the business of every exporting manufacturer of the products referred to herein, are also a part of the Japanese bounty program. Effective for accounting periods beginning on or after June 1, 1967, a corporation

increasing its expenditures for research and experimental projects as compared to the immediately preceeding [*sic*] period is allowed a tax credit in an amount equal to 25% of the incremental change up to 10% of the corporation tax due.

The Commodity Tax Law Exemption for Export

11. So called "indirect taxes" provide over forty percent of total national revenues in Japan—approximately three times the ratio of "indirect taxes" to total national revenues in the United States. A principal source of these taxes in Japan is provided by the Commodity Tax Law. Under this statute, with certain exceptions made from time to time, Japanese manufacturers are taxed on the manufacture and sale of the subject products at varying rates from 5% to 20%.

As an important part of the overall Japanese system designed to induce exportation by providing incentives therefor, as well as to subsidize exports and conceal dumping of consumer electronic products, Japan exempts from such taxes all exports of the subject merchandise. The exemption from these taxes provides an effective subsidy by excusing such exports from their proper share of the overall general tax burden.

The "plain, explicit, and unequivocal purposes" of our countervailing duty statute was set forth in *Nicholas & Co. v. United States*, 7 Ct. Cust. Appls., 97, 106, T.D. 36426 (1916), affirmed (1919) 249 U.S. 34, as follows:

> "• • • Whenever a foreign power or dependency or any political subdivision of a government shall give any aid or advantage to exporters of goods imported into this country therefrom whereby they may be sold for less in competition with our domestic goods, to that extent by this paragraph the duties fixed in the schedule of the act are increased. It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever

purposes it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof to any extent directly or indirectly. • • •

• • •

"• • • The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less. • • •"

As the Supreme Court unequivocally stated in *Downs* v. *United States*, (1903) 187 U.S. at pages 513, 515:

"• • • if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. • • •

• • •

"The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation."

In the Nicholas case the Supreme Court quoting from *United States* v. *Passavant*, (1898) 169 U.S. 16, explained the equitable basis and need for countervailing duties in such tax remissions for exports as are involved here:

"• • • We . . . said, through Mr. Chief Justice Fuller, that 'the laws of this country in the assessment of duties proceed upon the market value in the exporting country, and not upon the market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.' And this conclusion was reached upon the effect of the remitted tax, and not upon the word used to designate it. In other words, the decision was not determined by a consideration of costs of manufacture or their reimbursement, nor by the requirements of the policies of the exporting country. It regarded the fact and effect of the remitted excise." (249 U.S. at pages 40-41)

The efforts of the Treasury Department to have Congress amend Section 303 to exclude from its coverage all exemptions of exported articles from taxes imposed on like articles destined for consumption in the country of origin failed. It is submitted that Section 303 as written and as clearly interpreted in relevant rulings in Nicholas and Downs should not be ignored in the circumstances of the instant case. The Japanese commodity tax scheme is an integral part of their extensive bounty and grant program and clearly should be countervailed.

Shipping

An investigation should also be made as to the existence and effect of subsidization in the Japanese shipping industry which may disclose the need for countervailing duties to equalize the following unfair disparity between ocean freight rates applicable to shipments between Japan and the United States:

For the subject merchandise valued over $500 per ton, the rate from Japan to the United States is $40 per 40 cubic feet or per ton whichever is greater, while the freight rate on the same merchandise from the United States to Japan is $70.

Failure to Report Bounties and Grants

There is another aspect of this matter that should be given expeditious attention. Customs form 5515 requires answers to the following question:

> "6. Are any rebates, drawbacks, bounties, or other grants allowed upon the exportation of the goods? [ ] Yes [ ] No. If so, have all been separately itemized? [ ] Yes [ ] No."

On information and belief knowledgable importers of Japanese electronics products have been evading this question despite the sanctions provided in 19 U.S.C. 1592 and 18 U.S.C. 1001.

The Urgency of This Petition

While Section 303 does not require any showing of injury, the urgency of this matter and the need for an expeditious investigation and compliance with the mandate of the statute is apparent from the following facts:

Beginning in the 1950's, the Japanese participation in the United States electronics market has not been in any sense a matter of free trade. It has been a calculated predatory invasion based upon the following factors:

1. An elaborate government subsidy program.
2. Subsidized know-how and patent arrangements with certain experienced American companies.
3. A protected home market, effectively closed to American and other competition, where prices are controlled by trade associations and maintained at artificially high levels.
4. A dumping program eagerly patronized by large American merchandisers.

In the late 1950's, millions of excessively low priced transistor radios were dumped into the United States. By 1960, 55 percent of all portable radios sold in the United States were of Asiatic origin. By 1968, this figure rose to almost 95 percent and by the last quarter of 1969 to approximately 97 percent. For total radios, including portables but excluding automobile radios, imports accounted for approximately 88 percent of the market in 1969 and approximately 90 percent in the fourth quarter of 1969. Except for certain specialty types, the manufacture in the United States of radios was made economically impossible within ten years of this predatory invasion.

Having thus captured virtually the entire radio market and employing the same predatory tactics and aids described above, the Japanese manufacturers began in the 1960's to seize the American television market and make economically impossible the American manufacture of television receivers. From only 2 percent of the United States market in 1962, imported black and white television receivers rose to over 29 percent of the market in 1968 and in the fourth quarter of 1969 accounted for 50 percent of the entire American market. Imported color television which rose to 11 percent of the market in 1968, has risen in 1969 to over an 18 percent share of the market in the fourth quarter of 1969 and has accounted for more than 1 out of every 6 color television receivers sold in the United States. When color and black and white television statistics are combined, imports account for over 35 percent of the total television receiver market for the fourth quarter of 1969. For the same fourth quarter, the market share held by imported phonographs rose to over 34 percent and the share of the market held by imported home magnetic tape recorders rose to approximately 93 percent.

During this period of time many American manufacturers, in order to survive, were forced by this subsidized and predatory Japanese competition first to purchase components from Japanese sources and, when this measure

proved insufficient, to make or procure their radio and television chassis or complete sets in Japan, Hong Kong, and Taiwan. An alarming movement of American plants to Asia has taken place, and Taiwan and Mexico, providing subsidies and incentives as well as cheap labor, have become the new sites of many former American based factories. This trend for survival against unfair subsidized competition by moving American plants abroad is continuing at an alarming rate. It is conservatively estimated that over 45,000 jobs have already been lost to American workers in this industry as it rapidly retreats to foreign manufacturing sites. Many of them are blacks and members of other disadvantaged minorities trained or in the process of being trained for productive employment in this industry pursuant to suggested Government programs.

Petitioner favors and has always favored free and fair international trade. It cannot, however, continue to manufacture its products in this country unless the predatory incursion briefly described herein is stopped by the effective and expeditious enforcement of our relevant laws.

It is respectfully submitted that in the context of this industry crisis this petition for full and expeditious enforcement of Section 303 of the Tariff Act of 1930 should be favorably considered.

Respectfully submitted,

ZENITH RADIO CORPORATION

By /s/ PHILIP J. CURTIS
PHILIP J. CURTIS
Secretary

PJC/nb
Attachments

CONTENTS

Exhibit A.....List of Subject Dutiable Merchandise and Principal Japanese Producers

Exhibit B.....State Department Memorandum

Exhibit C.....Financing of Exports "Japan Foreign Trade News"

Exhibit D.....The Economic Growth of Japan "Scientific American"

Exhibit E.....A Brief Introduction to the Export Insurance

• • •

UNITED STATES COURT OF CUSTOMS
AND PATENT APPEALS

THE UNITED STATES, *Appellant*,

v.

ZENITH RADIO CORPORATION, *Appellee*.

Notice of Appeal

To the Honorable the United States Court of Customs and Patent Appeals:

Your appellant, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the accompanying Schedule A, respectfully prays your Court, pursuant to sections 1541(a) and 2601(a),(b), Title 28, United States Code, to review the questions involved therein and to grant such relief in the premises as to the Court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your appellant is dissatisfied are set forth in the accompanying Assignment of Errors.

Respectfully Submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General,

By: DAVID M. COHEN
Chief, Customs Section
Civil Division, Department of Justice
26 Federal Plaza
New York, N.Y. 10007
Attorney for the United States,
Appellant.

Dated: New York, N.Y.

ASSIGNMENT OF ERRORS

The United States Customs Court has erred as follows:

1. In finding and holding that the exemption, under the Commodity Tax [*sic*] of Japan, of television reecivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes from a commodity tax, when exported from Japan, or the refund of such tax upon the exportation from Japan of such electronic products constitutes the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. 1303.

2. In not finding and holding that the exemption, under the Commodity Tax [*sic*] of Japan, of the above enumerated electronic products from a commodity tax, when exported from Japan, or the refund of such tax upon exportation from Japan does not constitute the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, *supra*.

3. In directing the Secretary of the Treasury to order the appropriate customs officers throughout the United States to assess countervailing duties on the above enumerated electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of the Customs Court's order.

4. In directing the Secretary of the Treasury to act contrary to law.

5. In finding and holding for the appellee (plaintiff below), contrary to law.

SCHEDULE A

Subject: Electronic Products
Decided: April 12, 1977 (C.D. 4691)
Time to Appeal Expires: June 10, 1977
American manufacturer, producer, or wholesaler: Zenith Radio Corporation

[The notice of appeal was served and filed April 15, 1977.]

SUPREME COURT OF THE UNITED STATES

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed February 21, 1978.

The petition herein for a writ of certiorari to the United States Court of Customs and Patent Appeals is granted.

Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

No. 77-539

In the Supreme Court of the United States

OCTOBER TERM, 1977

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
LEONARD SCHAITMAN,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
1. History of the present litigation	3
2. The government's position on countervailing duties	5
Argument	7
Conclusion	17
Appendix	14
Cases:	
American Express Co. v. *United States*, 472 F. 2d 1050	6
Downs v. *United States*, 187 U.S. 496	4, 15
Komada v. *United States*, 215 U.S. 392	14
Massachusetts Mutual Life Ins. Co. v. *United States*, 288 U.S. 269	13–14
Nicholas & Co. v. *United States*, 249 U.S. 34, affirming 7 Cust. Appls. Rep. 97	16
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294	11
Saxbe v. *Bustos*, 419 U.S. 65	11, 13
Train v. *Colorado Public Interest Research Group*, 426 U.S. 1	11
Udall v. *Tallman*, 308 U.S. 1	11
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290	11
Statutes and regulations:	
Act of October 1, 1890, Paragraph 237, 26 Stat. 584	8, 1A
Act of August 27, 1894, Paragraph 182½, 28 Stat. 521	9, 1A
General Agreement on Tariffs and Trade, Article VI (4), 61 Stat. A24	7
Tariff Act of 1897, 30 Stat. 151	6
Section 3, 30 Stat. 205	9, 2A

252-346

Tariff Act of 1909, 36 Stat. 85 ---- 12
Tariff Act of 1913, 38 Stat. 192 ---- 12
Tariff Act of 1922, 42 U.S.C. 935 ---- 12
Tariff Act of 1930, 46 Stat. 590, as amended, 19 U.S.C. 1202 *et seq.*:
Section 303, 19 U.S.C. (and Supp. V) 1303 ---- 3, 5, 6, 9, 12, 13, 14, 15
Section 303(a)(1), 19 U.S.C. (Supp. V) 1303 (a)(1) ---- 2, 3A
Section 516(a), 19 U.S.C. 1516(a) ---- 3
Section 516(d), 19 U.S.C. (Supp. V) 1516(d) ---- 3
Trade Act of 1974, Section 331(a), 88 Stat. 2049 ---- 12, 13
Miscellaneous:
2 Compendium of Papers on Legislative Oversight Review of United States Trade Policies, Senate Committee on Finance, 90th Cong., 2d Sess. (1968) ---- 12
26 Cong. Rec. 784 (1894) ---- 10
26 Cong. Rec. 5705 (1894) ---- 10
30 Cong. Rec. (1897):
p. 1646 ---- 10
p. 1650 ---- 10
p. 1658 ---- 10
p. 1674 ---- 10
p. 1680 ---- 10
p. 1719 ---- 10
p. 1721 ---- 10
pp. 1721–1722 ---- 10
p. 1729 ---- 10
Executive Branch GATT Studies, Senate Committee on Finance, 93d Cong., 2d Sess. (1974) ---- 7
41 Fed. Reg. 1298 ---- 4
H.R. 8304, 81st Cong., 2d Sess. (1951) ---- 12
Hearings on H.R. 1535 before the House Committee on Ways and Means, 82d Cong., 1st Sess. (1951) ---- 12
Hearings on H.R. 6767 before the House Committee on Ways and Means, 93 Cong., 1st Sess. (1973) ---- 12, 13
Hearings on H.R. 1612 before the Senate Committee on Finance, 83d Cong., 1st Sess. (1951) ---- 12
Hearings on H.R. 5505 before the Senate Committee on Finance, 82d Cong., 2d Sess. (1952) ---- 12-13

Miscellaneous—Continued — Page
S. Rep. No. 93–1298, 93d Cong., 2d Sess. (1974) ---- 14
S. Rep. No. 91–1481, 91st Cong., 2d Sess. (1970) ---- 12
T.D. 19321, 1 Synopsis of Decisions 696 (1898) ---- 6
T.D. 19729, 2 Synopsis of Decisions 157 (1898) ---- 6
T.D. 20039, G.A. 4261, 2 Synopsis of Decisions 534 (1898) ---- 6
T.D. 34466, 26 Treas. Dec. 825 (1914) ---- 16
T.D. 35595, 29 Treas. Dec. (1915) ---- 16
T.D. 42895, 54 Treas. Dec. 101 (1928) ---- 6
T.D. 43634, 56 Treas. Dec. 342 (1929) ---- 6
T.D. 49355, 73 Treas. Dec. 107 (1938) ---- 6

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 5a–112a) is reported at 562 F. 2d 1209. The opinion of the Customs Court (Pet. App. 1a–50a) is reported at 430 F. Supp. 242.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. The petition for a writ of certiorari was filed on October 11, 1977. Jurisdiction is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether a bounty or grant within the purview of Section 303 of the Tariff Act of 1930 is paid or bestowed when the Japanese Commodity Tax, which is imposed upon certain consumer electronic products sold in Japan, is not imposed upon such products exported to the United States.

STATUTE INVOLVED

Section 303(a) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. (Supp. V) 1303(a)(1) provides:

> (1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

STATEMENT

1. *History of the Present Litigation.* In April 1970, petitioner, a domestic manufacturer of various consumer electronic products, filed a petition with the Commissioner of Customs requesting the Commissioner to assess countervailing duties, under Section 303 of the Tariff Act of 1930, 46 Stat. 687, 19 U.S.C. 1303, upon various consumer electronic products exported from Japan.[1] Petitioner claimed that the products benefited from bounties or grants conferred by the Government of Japan because, *inter alia,* Japan imposes an ad valorem tax, the Japanese Commodity Tax, when those products are sold in Japan but remits that tax when the products are exported[2] (Pet. App. 2a; R. 320–331).[3]

---

[1] In 1970 Congress for the first time provided a statutory mechanism whereby manufacturers and others could require the Secretary to determine whether countervailing duties should be imposed on imported articles. 19 U.S.C. 1516(a). In 1974, Congress made the Secretary's negative countervailing duty determinations subject to judicial review by providing, in 19 U.S.C. (Supp. V) 1516(d), that within 30 days of the publication of such a determination "the manufacturer * * * may commence an action in the United States Customs Court contesting such determination."

[2] In general, the tax is paid by the manufacturer when the goods are shipped from the factory (Pet. App. 2a). The tax is not collected when the products are exported or, if collected, it is rebated. For convenience, as used in this brief, "remitted" or "remission" refers both to the failure to collect the tax upon exported goods and to the rebate of the tax if the tax is first paid and then the goods exported. A "remission" which does not exceed the amount of the tax imposed in the domestic market is referred to as a "non-excessive remission."

[3] "R." refers to the transcript of record filed in the Court of Customs and Patent Appeals, a copy of which has been filed by petitioner in this Court.

In January 1976, after a proceeding in which public comment was invited, the Treasury Department published notice that "on the basis of the additional facts gathered and the investigation conducted pursuant to * * * Customs Regulations * * * a final determination * * *" had been made that no bounty or grant within the meaning of Section 303 had been paid or bestowed by Japan upon the challenged electronic products. 41 Fed. Reg. 1298.

Petitioner then filed this suit in the Customs Court contesting the final determination as it applied to the remission of the Japanese Commodity Tax with respect to certain Japanese electronic products specified in the complaint (R. 11–18). The court granted petitioner's motion for summary judgment. Relying primarily on *Downs* v. *United States,* 187 U.S. 496, the court held that, as a matter of law, the remission of the Japanese Commodity Tax constituted a bounty or grant (Pet. App. 5a). Accordingly, the court ordered the Secretary to determine the net amount of the bounty or grant and to impose a countervailing duty equivalent to that amount upon all Japanese consumer electronic products specified in the complaint entered or withdrawn from warehouse for consumption on or after the day following the court's order (Pet. App. 53a).

The Court of Customs and Patent Appeals reversed and remanded with directions to enter summary judgment for the government. The court held that *Downs* was not controlling because the complex Russian

scheme at issue in that case involved not only the remission of excise taxes to exporters but also further payments to them on the export of sugar. The court concluded that the bounty actually assessed in *Downs* "was found to reside in, and was measured by, an *excess* over the remission of excise taxes" (Pet. App. 67a, n. 12), and that *Downs* did not, therefore, involve the issue presented here—whether a non-excessive remission of a tax, standing alone, constitutes a bounty or grant within the scope of Section 303 (*id.* at 66a). The court further concluded that nothing in the legislative history of the statute indicated that a countervailing duty must be imposed in the circumstances presented here (*id.* at 70a); that the Secretary's interpretation had been consistently followed since 1898 and was therefore entitled to great weight (*id.* at 74a–75a); and that congressional reenactment of the statute with knowledge of the Secretary's interpretation further indicated congressional ratification of that view (*id.* at 76a–82a).

2. *The Government's Position on Countervailing Duties.* A countervailing duty statute pertaining only to imported sugar was first enacted in 1890. That statute was reenacted in 1894 and again in 1897, when it was broadened to cover all imported products and codified in the form in which, for all material purposes, it exists today in Section 303.

Since at least 1898 the Department of the Treasury has adhered to the position that a foreign country's remission of certain indirect taxes, such as excise taxes

252-346—77——2

or sales taxes, upon the export of a product is not a "bounty" or "grant" within the meaning of Section 303.[4] For purposes of the countervailing duty statute, the Secretary has drawn a distinction between "indirect taxes", like sales taxes or other taxes imposed on the product itself—the remission of which is not considered a bounty—and "direct taxes", like income taxes imposed directly on the producer—the remission of which is considered to be a bounty. See *American Express Co.* v. *United States,* 472 F. 2d 1050, 1057, n. 9 (C.C.P.A.). The basic theory of the distinction is that the imposition of indirect taxes is customarily left to the country where the products are ultimately sold or consumed. Where a country like Japan imposes such a tax at only one stage—here upon manufacture—the remission of such a tax upon export is regarded not as a "bounty" on export but rather as the elimination of the double taxation that would result from the imposition of similar taxes by the importing country (*e.g.,* a New Jersey sales tax). It is believed that producers do not significantly absorb indirect taxes themselves but instead shift them to the consumer; the remission of such taxes is therefore thought

[4] The Secretary's interpretation of the statute as not encompassing the non-excessive remission of an indirect tax directly related to a product was first announced on May 6, 1898, less than one year after the Tariff Act of 1897 was enacted on July 19, 1897 (30 Stat. 151). See T.D. 19321, 1 Synopsis of Decisions 696 (1898). This interpretation has been consistently followed since that date. *E.g.*, T.D. 19729, 2 Synopsis of Decisions 157, 157–58 (1898); T.D. 20039, G.A. 4261, 2 Synopsis of Decisions 534, 535–536 (1898); T.D. 49355, 73 Treas. Dec. 107 (1938). See T.D. 42895, 54 Treas. Dec 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929).

not to affect the producer's decision whether or not to export.[5]

Of course, the remission of indirect taxes by an exporting country will rarely counterbalance exactly the imposition of similar taxes by the importing country, and it is virtually impossible to determine with precision the degree to which taxes are absorbed rather than shifted. The Secretary has adopted a bright-line distinction in order to facilitate administration of the statute and to assist the conduct of foreign trade relations. That distinction, moreover, has been adopted by the General Agreement on Tariffs and Trade,[6] to which the United States is a party, and is accepted as a fundamental principle by every major trading nation in the world.

ARGUMENT

1. The issue in this case is important to the United States in its trade negotiations with other nations. As we have noted immediately above, the principle that countervailing duties shall not be assessed with respect to the remission of the kind of taxes involved in this case is a basic understanding of existing trade agreements to which the United States is a party. The United States is currently preparing for a major round of negotiations in early 1978, the Multilateral Trade Negotiations, that are being held

[5] See *Executive Branch GATT Studies*, Senate Committee on Finance, 93d Con., 2d Sess. 11–12 (1974), quoted from by the court below (Pet. App. 74a, n. 19).

[6] Article VI(4) of the General Agreement on Tariffs and Trades, 61 Stat. A24, provides "no product * * * imported into

under the auspices of the General Agreement on Tariffs and Trades and that are intended to review a wide range of practices inhibiting or distorting trade, including export subsidies and countervailing duties. Adoption of petitioner's construction of Section 303 not only would risk a significant breakdown in international trading agreements and retaliatory actions from our trading partners but also would undermine our negotiating flexibility in the forthcoming talks. Indeed, so long as the decision below remains subject to review and possible reversal by this Court, there will be considerable uncertainty with respect to this government's position and negotiating options in those discussions.

2. The decision of the Court of Customs and Patent Appeals was correct.

a. The legislative history of the countervailing duty statute indicates that Congress did not intend to require the imposition of countervailing duties on non-excessive remissions of indirect taxes. The statutory obligation to impose countervailing duties first appeared in the sugar tariff of 1890 (Paragraph 237 of the Act of October 1, 1890, 26 Stat. 564, 584; see App., *infra*), which provided that all imported sugars above a certain grade

> shall pay one-tenth of one cent per pound in addition to the rate herein provided for, when

---

the territory of any other contracting party shall be subject to * * * countervailing duty by reason of the exemption of such product from * * * taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such * * * taxes."

> exported from, or a product of any country when and so long as such country pays or shall hereafter pay, directly or indirectly a bounty on the exportation of [certain grades of] sugar * * *.

This provision was reenacted in 1894 in largely the same form, but Congress added the following proviso (Paragraph 182 1/2 of the Act of August 27, 1894, 28 Stat. 509, 521; see App., (*infra*):

> *Provided,* That the importer of sugar produced in a foreign country, the Government of which grants such direct or indirect bounties, may be relieved from this additional duty * * * in case said importer produces a certificate of said Government that no indirect bounty has been received upon said sugar *in excess of the tax collected upon the beet or cane from which it was produced* * * *. [Emphasis supplied.]

In 1897, the countervailing duty statute was revised and made applicable to all imported products (Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205; see App., *infra*). The proviso in the 1894 statute was deleted, and the method of determining the countervailing duty to be imposed was altered to provide, as Section 303 provides today, that "there shall be levied and paid * * * an additional duty equal to the *net* amount of such bounty or grant * * * (*ibid;* emphasis supplied).

The floor debates on the 1894 and 1897 statutes demonstrate that the phrase "net bounty" added by the 1897 statute was meant to incorporate the principle, expressly set forth in the 1894 proviso, that only excess remissions of taxes triggered the obligation to impose a

countervailing duty. Thus, in the course of the Senate debate on the 1894 provision, its sponsor, Senator Jones, gave as an illustration of the operation of the statute the case of Germany, which paid exporters 21½ cents per hundred pounds of sugar exported but imposed an internal tax of about 15 cents per hundred pounds, so that "there is a net bounty on the exportation of refined sugar of six and a half one hundredths of a cent [per pound]." (26 Cong. Rec. 5705 (1894). And in the course of the debate on the 1897 statute, Senator Allison, sponsor of that provision, advised Senator Jones that "the countervailing duty is only an emulation of your own committee in 1894 * * *" (30 Cong. Rec. 1719 (1897)), and later stated that his proposal was concerned only with "the net bounty, less the taxes and reductions which I have named." (*id.* at 1721). The same understanding is reflected elsewhere in the debates.[7]

While the court below concluded only that nothing in the legislative history "indicates a Congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us" (Pet. App. 70a), we submit that the legislative history affirmatively establishes that Congress intended that countervailing duties were not to be imposed with respect to such

[7] Throughout the debates on the 1897 statute, which focused on German sugar exports, the figures cited for the bounties paid by Germany did not include an addition to account for the fact that Germany remitted or did not collect its internal tax on exported sugar (see 30 Cong. Rec. 1650, 1658, 1674, 1680, 1694, 1719, 1729, 1721–1722 (1897)), although Congress was aware of that fact (26 Cong. 784 (1894) (Senator Quay); 26 Cong. 5706 (1894) (Senator Jones); 30 Cong. Rec. 1646 (1897) (Senator Vest)).

remissions and provides substantial further support for the result reached below.[8]

b. In accordance with the intent of Congress reflected in the legislative history, since 1898 the Department of the Treasury has consistently adhered to the position that the nonexcessive remission of the kind of taxes involved here does not require countervailing duties under the statute (see pages 5–7, *supra*). The reasonable and consistent administrative interpretation of a statute, particularly when it is contemporaneous with the statute's enactment, is entitled to great weight. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65, 74; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. There is no reason to depart from that principle here.[9]

[8] The Customs Court accepted petitioner's argument that "net bounty" is so unambiguous a phrase that resort to legislative history is precluded by the plain meaning rule (see Pet. App. 8a), and apparently concluded that in any event "debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body" (Pet. App. 9a, citing *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318). Whatever currency such a doctrine may have had at one time, this Court since then often has recognized the relevance of congressional debates, and particularly the statements of sponsors and floor managers of bills, in construing legislation. See *e.g.*, *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10, 14.

[9] Petitioner does not contend that the Treasury's position in general, or as applied to the tax involved in this case, is arbitrary, capricious, or even unreasonable, or that the economic theories underlying that position are fallacious. Rather, its only contention is that, as a matter of law, remission of taxes upon export, whatever the circumstances, is a grant or bounty giving rise to the obligation to impose a countervailing duty (see Pet. 7–12). Since

c. The Secretary's interpretation of the statute is further supported by the fact that Congress has reenacted the relevant statutory language many times since that interpretation was first announced. Moreover, as the court below noted (Pet. App. 77a) and as petitioner admits (Pet. 13), Congress was specifically informed of the interpretation nearly 30 years ago—and presumably was aware of it before then [10]—and has been repeatedly advised of Treasury's interpretation since that time.[11] Yet Congress has never expressed its disproval of the practice.[12]

---

the issue is solely one of law, there is no basis for petitioner's contention (Pet. 18–21) that summary judgment for the government was inappropriate, or that a remand is necessary for a further factual inquiry.

[10] Congress reenacted the relevant statutory language four times between 1898 and 1950. Tariff Act of 1909, 36 Stat. 85; Tariff Act of 1913, 38 Stat. 192; Tariff Act of 1922, 42 Stat. 935; Trade Act of 1974, Section 331(a), 88 Stat. 2049. As the court below noted (Pet. App. 77a), it is difficult to assume that Congress took this action without knowledge of the Secretary's practice.

[11] Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess. 2244–2246, 2419, 2421, 5126–5130, (1973); S. Rep. No. 91–1481, 91st Cong., 2d Sess. 284–85 (1970); 2 Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies, Senate Committee on Finance, 90th Cong., 2d Sess. 475–476, 568–569, 887–889, 918–919 (1968); Hearings on H.R. 1612 before the Senate Committee on Finance, 82d Cong., 1st Sess., 1197 (1951); Hearings on H.R. 1535 before the House Committee on Ways and Means, 82d Cong., 1st Sess. 2, 79 (1951).

[12] In 1950 and 1951, the Department of the Treasury proposed an amendment to the countervailing duty statute which, *inter alia*, would have incorporated the Secretary's practice into the statutory language. See H.R. 8304, 81st Cong., 2d Sess. (1951); Hearings on H.R. 1535 before the House Committee on Ways and Means, 82d Cong., 1st Sess. 2, 79 (1951). The proposed provisions, subsequently incorporated into H.R. 5505 (see Hearings on H.R. 5505 before the Senate Committee on Finance, 82d Cong., 2d Sess. 2 (1952)), was not enacted into law. However, as the court below found (Pet. App. 77a), the only congressional objection to the proposed amendment was directed to the fact that it would have added a requirement to the bill prohibiting the imposition of a countervailing duty if the "bounty or grant" did not cause injury to a domestic industry. See Hearings on H.R. 5505 before the Senate Committee on Finance, *supra*, at 115, 124–125. Therefore, as the court below correctly held (Pet. App. 77a–78a), the failure to adopt the amendment does not indicate congressional disagreement with the Secretary's reading of the statute.

Indeed, in 1973, in the course of its most recent consideration of the statute, Congress was specifically apprised of the remission of the Japanese Commodity Tax and of petitioner's countervailing duty petition which was then pending before the Secretary. See Hearings on H.R. 6767 before the House Committee on Ways and Means 93d Cong., 1st Sess. 2169–2171, 2496–2500, 3097, 3292–3293, 3814–3815, 1973. Although a witness specifically requested an amendment to the statute so as to encompass the non-excessive remission of a tax,[13] Congress refused to adopt the amendment and reenacted the statute without any change in the language which the Secretary has consistently interpreted as not encompassing such a remission. 88 Stat. 2049. By doing so, Congress ratified the Secretary's construction of the statute. See, *e.g.*, *Saxbe* v. *Bustos*, *supra*; *Massachusetts Mutual Life Ins. Co.* v. *United*

[13] See Hearings on H.R. 6767 before the House Committee on Ways and Means, *supra*, at 2169–2171, 2496–2500, 3097, 3292–3293, 3814.

States, 288 U.S. 269 273; *Komada* v. *United States* 215 U.S. 392.[14]

d. Contrary to petitioner's contention (Pet. 8–9), the decision below is not inconsistent with *Downs* v. *United States, supra.* As the court below found (Pet. App. 61a), the *Downs* case involved a complex scheme designed by the Russian government to protect its sugar industry and to promote exportation of sugar. This scheme involved, *inter alia,* a high import tariff on sugar; an estab-

[14] Petitioner's contention to the contrary (Pet. 13) is incorrect. Thus, for example, petitioner incorrectly states (Pet. 13–14) that Congress was informed of a "conflict" between the Secretary's practice and judicial decisions on the question. In fact, Congress was informed in 1951 that the judicial opinions were not clear and that the amendment to the countervailing duty then proposed by the Department of the Treasury would "eliminate the possibility of [judicial] rulings in conflict with the administrative practice which has been followed for over 50 years" (see Pet. App. 26a).

Petitioner also contends (Pet. 14) that after notification of the Secretary's practice in 1968, Congress took action which indicated congressional disapproval of the Secretary's interpretation of Section 303. In fact, the only "action" taken occurred in 1970, two years later, and took the form of a request for a study in the matter (Pet. App. 103a–104a).

Similarly, petitioner alleges (Pet. 16–18) that Congress amended the statute in 1975 and thereby indicated its disapproval of the Secretary's practice. However, the only amendment to Section 303 related to the administration of the statute, including the establishment of time limits for investigations, publication of decisions, and judicial review. See 88 Stat. 2049. No change was made in the substance of the statute and no disapproval of the Secretary's construction was expressed. See S. Rep. No. 93–1298, 93d Cong., 2d Sess. 183–191 (1974).

lished domestic price which was higher than the world price; a limitation, enforced in part by double excise taxation, upon the quantities of sugar that could be sold domestically; remission of the excise tax upon exportation; and permission, in the form of a marketable certificate, for producers to market, at the high domestic price, a quantity of sugar equivalent to the quantity of sugar exported. *Downs* v. *United States, supra,* 187 U.S. at 502–511.

The opinion of this Court in *Downs* sustaining the Secretary's finding of a bounty does contain a statement to the effect that when a tax is imposed on goods sold in the domestic market but is remitted upon the goods when exported, a bounty upon exportation results. 187 U.S. at 515. However, this statement must be considered in the context of the entire interrelated Russian scheme considered and discussed at length in *Downs,* and can at most be read to indicate that the remission of excise taxes in combination with the grant of valuable certificates to exporters constitutes a bounty or grant. Moreover, the record in that case indicates, as the court below found (Pet. App. 67a, n. 12), that the countervailing duty assessed by the Secretary did not in fact include the amount of the excise tax remissions.[15] The question whether the non-

[15] A photocopy of a memorandum of the Secretary of the Treasury which was attached to the brief of the United States before the Board of General Appraisers in *Downs* was attached as

excessive remission of a tax, standing alone, constitutes a bounty or grant was not before the Court in *Downs*, and the opinion cannot be taken as having decided that question."[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
LEONARD SCHAITMAN,
DAVID M. COHEN,
Attorneys.

DECEMBER 1977.

Appendix C to Defendant's Brief in Opposition to the Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for summary Judgment filed in the Customs Court below. This memorandum, the authenticity of which is not challenged by petitioner, demonstrates that countervailing duty imposed in *Downs* was not based upon the remission of the excise tax but upon the value of the marketable certificates.

[16] Nor is the decision below in conflict with this Court's decision in *Nicholas & Co.* v. *United States*, 249 U.S. 34. In that case, the Secretary imposed a countervailing duty because of an "allowance" received by the British distillers, not because of remitted taxes. T.D. 34466, 26 Treas. Dec. 825 (1914). Indeed, the Board of General Appraisers specifically noted that the remission of the tax was not before it. T.D. 35595, 29 Treas. Dec. 59 (1915). See also, 7 Cust. Appls. Rep. 97, 104; 249 U.S. at 37. Thus the question whether the remission of a tax constituted a bounty or grant was not presented in *Nicholas*.

APPENDIX

Paragraph 237 of the Act of October 1, 1890, 26 Stat. 584 provided:

> All sugars above number sixteen Dutch standard in color shall pay a duty of five-tenths of one cent per pound: *Provided*, That all such sugars above number sixteen Dutch standard in color shall pay one-tenth of one cent per pound in addition to the rate herein provided for, when exported from, or the product of any country when and so long as such country pays or shall hereafter pay, directly or indirectly, a bounty on the exportation of any sugar that may be included in this grade which is greater than is paid on raw sugars of a lower saccharine strength; and the Secretary of the Treasury shall prescribe suitable rules and regulations to carry this provision into effect: * * *.

Paragraph 182½ of the Act of August 27, 1894, 28 Stat. 521 provided:

> There shall be levied, collected, and paid on all sugars and on all tank bottoms, sirups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, a duty of forty per centum ad valorem, and upon all sugars above number sixteen Dutch standard in color and upon all sugars which have been discolored there shall be levied, collected, and paid a duty of one-eighth of one cent per pound in addition to the said duty of forty per centum ad valorem; and all sugars, tank bottoms, sirups of can juice or of beet juice, melada, concentrated melada, con-

crete or concentrated molasses, which are imported from or are the product of any country which at the time the same are exported therefrom pays, directly or indirectly, a bounty on the export thereof, shall pay a duty of one-tenth of one cent per pound in addition to the foregoing rates: *Provided,* That the importer of sugar produced in a foreign country, the Government of which grants such direct or indirect bounties, may be relieved from this additional duty under such regulations as the Secretary of the Treasury may prescribe, in case said importer produces a certificate of said Government that no indirect bounty has been received upon said sugar in excess of the tax collected upon the beet or cane from which it was produced, and that no direct bounty has been or shall be paid: * * *.

Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205 provided:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or

> grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. (Supp. V) 1303 provides in pertinent part:

> (a) *Levy of countervailing duties.*
>
> (1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however, the same be paid or bestowed.

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
DEC 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

December 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

REPLY TO BRIEF IN OPPOSITION

This reply responds to the Government's brief in opposition to certiorari.

1. The Government does not dispute the vast importance of the principal issue of this case to American industry and labor. It admits that the issue is important to the United States in its trade negotiations with other nations. Brief, 7. Instead of concluding that the case warrants review by this Court, however, it urges the opposite—*viz.*, that the case is so important that it should *not* be reviewed for fear that the decision below might be reversed. *Id.* at 8.[1]

---

[1] The Government also tells this Court that so long as the decision below remains subject to review and possible reversal, the Government's flexibility in a round of trade negotiations to be commenced (the end of which is nowhere in sight) would be im-

The Government's position would subvert our Constitutional system. Its plea to this Court is therefore alarming. When Congress amended the countervailing duty law in 1975, it took pains to assure that domestic industry would receive the protection of the countervailing duty law *during a period of contemplated international negotiations*. Not only did Congress impose time limits on the Secretary of the Treasury and make judicial review of negative countervailing duty determinations available on an expedited basis to American manufacturers, but it also strictly limited the Secretary's discretion to postpone countervailing duty actions and decisions during trade negotiations, and then only under a specific procedure which the Government does not invoke here. *See* 19 U.S.C. § 1303(d)(2) and (e) (Supp. V 1975) [Appendix D to the Petition, 118a-120a].[1]

The Government comes before this Court in defiant disregard of this Congressional plan and intent and asks that it not state what the law is on the ad-

paired. Brief, 8. Interestingly, such principal trade experts in the Congress as Senator Russell B. Long (Chairman, Senate Committee on Finance) and Representative Charles A. Vanik (Chairman, Subcommittee on Trade, House Committee on Ways and Means) have expressed the view that the United States' negotiating position would be improved by a judicial decision upholding petitioner's position. *See* Daily Report for Executives, No. 141, page J-2 (July 21, 1977); The Plain Dealer (Cleveland, Ohio), April 24, 1977, § 6, at 1, col. 3.

[1] In the House-passed trade bill, the Secretary of the Treasury was authorized to suspend the imposition of countervailing duties if he determined that such imposition would be likely to seriously jeopardize the satisfactory completion of certain international negotiations. H.R. 10710, 93d Cong., 1st Sess., § 331 (1973). The Senate (and ultimately the Congress) felt that such a proposal failed to protect sufficiently the needs of domestic industry. *See* S. Rep. No. 93-1298, 93d Cong., 2d Sess. 183-188 (1974).

mittedly important issue presented for decision. The Government, in effect, argues that the decision below is expedient and even if incorrect should not be disturbed. Clearly, that approach is offensive to our system of laws and should be rejected.

2. The Government urges that the decision below was correct and is supported by the legislative history of the 1897 countervailing duty law, administrative practice, Congressional ratification, and this Court's decision in *Downs* v. *United States*, 187 U.S. 496 (1903). However, the following should be noted:

(a) The "legislative history" upon which the Government relies is nothing but fragments of confused debate and comment, which petitioner demonstrated, at length, in its briefs in the Courts below, to be unsupportive of the Government's position. Indeed, the Government's argument on this point failed to commend itself to a single one of the eight judges of the Courts below.[1]

(b) In urging that the Treasury Department's practice of not countervailing "nonexcessive" tax remissions is reasonable and lawful (brief, 11, 5-7), the Government (1) unduly minimizes the trade distortive effect of tax remission on exports, which has been repeatedly acknowledged by the Executive Branch (*see* authorities cited in petition, 20), (2) misrepresents the petitioner's position by suggesting that peti-

[1] The Government's inference (brief, 11 n. 8) that the Customs Court did not study the legislative history of the 1897 Act is incorrect. Each of the three Customs Court judges considered the legislative history and found it not to support the Government. *See* Appendix A to the Petition, pages 9a-13a, 18a-21a, 39a-42a.

tioner does not contend that the Treasury's position is arbitrary or unreasonable or that the economic theory underlying that position is fallacious, (3) ignores the teachings of this Court in *Downs, supra, United States* v. *Passavant,* 169 U.S. 16 (1898), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), and (4) incorrectly implies that the GATT [4] rule on countervailing duties is somehow binding on the United States, when in fact, as both Courts below recognized, and as the Government knows well, GATT does not control.[5] Appendix A to the Petition, 14a, 30a; Appendix C to the Petition, 76a n. 21.

(c) In urging that Congress (in 1975) ratified Treasury's practice (brief, 13), the Government ignores the reports of the key committee of each chamber of Congress stating that no such ratification was intended.[6] In saying that the only congressional objection to the 1950-52 proposed legislation which would have legitimatized Treasury's practice was occasioned by an "injury" requirement (brief, 13 n. 12), the Government ignores the testimony of Senator O'Mahoney to which petitioner called attention.[7]

(d) In its discussion of *Downs, supra,* the Government essentially chooses not to confront the numer-

[4] General Agreement on Tariffs and Trade.

[5] Not only has Congress never delegated any authority to the Executive Branch to amend the countervailing duty law, but when the United States acceded to GATT in 1947, it agreed to undertake the relevant part "to the fullest extent not inconsistent with existing legislation." *See* Appendix A to the Petition, 14a, 30a.

[6] *H.R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974).

[7] *See* petition, 14 n. 16.

ous authorities which petitioner cited (*see* petition, 9-11), and instead attempts to draw inferences, regarding the Court's teachings, from the amount of countervailing duties assessed, a point explicitly not in issue in the *Downs* case. *See Downs* v. *United States,* 113 Fed. 144, 146 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903).

3. The Government's summary treatment of the second question presented by petitioner [8] totally misses the point. *See* Government brief, 11-12 n. 9. While it is true that both parties argued that their respective positions were correct as a matter of law, the majority of the Court below agreed with neither party. Rather, the majority presumed that certain facts existed and, relying on that presumption, directed that summary judgment be awarded to the Government. Petitioner's argument that the Court below, in taking this action, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision has not been met.

[8] "Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303."

In sum, this case is of undisputed importance and the decision below is manifestly indefensible. The Government's brief in opposition really highlights the importance of this Court's granting certiorari.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

December 1977

Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

BRIEF FOR THE PETITIONER

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

March 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	3
Background	3
Decision of the Customs Court	5
Decision of the Court of Customs and Patent Appeals	6
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. This Court Has Ruled That The Remission Of A Tax On Products Exported To The United States When Such Products Are Subject To Tax In Their Country Of Production Constitutes A Bounty Or Grant Under The Countervailing Duty Law, And This Ruling Has Been Ratified By Congress	9
II. Congress Did Not Acquiesce In Any Treasury Department Practice To Countervail "Excessive" Tax Remissions Only	19
III. The Secretary Of The Treasury Did Not Make A Determination That The Economic Result Of The Remission Of The Commodity Tax Is Not The Conferring Of Such A Benefit, Subsidy, Or Incentive As Would Rise To The Level Of A Bounty Or Grant Under Section 303	36
CONCLUSION	44
APPENDIX TO BRIEF	1a

CASES: Page

American Express Company v. *United States*, 472 F.2d 1050 (C.C.P.A. 1973) 38
American Express Company v. *United States*, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973) 11
Downs v. *United States*, 187 U.S. 496 (1903) ..5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 39
Downs v. *United States*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 14
Downs v. *United States*, 4 Treas. Dec. 405, T.D. 22984 (Bd. Gen. App. 1901), *aff'd*, unpublished (C.C. Md. 1901), *aff'd*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 12, 14
Eisner v. *Macomber*, 252 U.S. 189 (1920) 15
F. W. Meyers & Co. v. *United States*, 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903) 11, 16
Hammond Lead Products, Inc. v. *United States*, 306 F.Supp. 460 (Cust. Ct. 1969), *reversed on jurisdictional grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 11
Hecht v. *Malley*, 265 U.S. 144 (1924) 19
Massachusetts v. *United States*, 333 U.S. 611 (1948) .. 15
Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) ..5, 7, 10, 11, 14, 17, 18, 19, 36, 39
Nicholas & Co. v. *United States*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 17
Nicholas & Co. v. *United States*, 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 11, 17
Shapiro v. *United States*, 335 U.S. 1 (1947) 19
United States v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 11, 28, 29, 30
United States v. *Passavant*, 169 U.S. 16 (1898) ..14, 15, 39
Wessels & Bro. v. *United States*, 6 Treas. Dec. 319, T.D. 24355 (Bd. Gen. App. 1903) 11, 15, 16
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) .. 15

STATUTES:

Antidumping Act of 1921
Section 203 [19 U.S.C. § 162 (1970) (amended 1975)] 24

Page

Tariff Act of 1897, 30 Stat. 151
Section 5 9

Tariff Act of 1909, 36 Stat. 11
Section 6 16

Tariff Act of 1913, 38 Stat. 114
Section IV, paragraph E 16

Tariff Act of 1922, 42 Stat. 858
Section 303 19

Tariff Act of 1930, 46 Stat. 590
Section 303 [19 U.S.C. § 1303 (Supp. V 1975)] . 2, 3, 4, 5, 9, 19, 20, 22, 24, 26, 33, 34, 35, 36, 37

Section 516 [19 U.S.C. § 1516 (Supp. V 1975)] . 3, 5, 24

Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978 (1975)
Section 331(a) 4, 19, 27

Section 331(d) 4, 27

19 U.S.C. § 2112 (Supp. V 1975) 26

28 U.S.C. § 255 (1970) 5

28 U.S.C. § 1256 (1970) 2

MISCELLANEOUS:

Analysis of Customs Simplification Act of 1950 20

118 Cong. Rec. 23883 (1972) 30

118 Cong. Rec. 29698 (1972) 30

118 Cong. Rec. 32413-16 (1972) 30

118 Cong. Rec. 37098 (1972) 32

41 Fed. Reg. 1298 (1976) 4

GATT, *Basic Instruments and Selected Documents* [BISD], 9th Supp. (1961) 38

1 GATT, *Basic Instruments and Selected Documents* [BISD] (1955) 38

General Agreement on Tariffs and Trade, 61 Stat. All (1947) 37, 38, 39, 40, 41, 42

Page

H. R. 8304, 81st Cong., 2d Sess. (1950) 20, 21
H. R. 1535, 82d Cong., 1st Sess. (1951) 21
H. R. 5505, 82d Cong., 1st Sess. (1951) 21
H. R. 15794, 92d Cong., 2d Sess., 118 Cong. Rec. 23484 (1972) 29
H. R. 6767, 93d Cong., 1st Sess. (1973) 26, 28, 32
H. R. 10710, 93d Cong., 1st Sess. (1973) 32
H. R. Rep. No. 92-1583, 92d Cong., 2d Sess. (1972) 31
H. R. Rep. No. 92-571, 93d Cong., 1st Sess. (1973) . 25, 32, 33
Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. (1968) 22
Hearings on H. R. 5505 Before the Senate Comm. on Finance, 82d Cong., 2d Sess. (1952) 21
Hearings on H. R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. (1973) 28
Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance, 92d Cong., 1st Sess. (1971) 22, 23, 41, 42
House Comm. on Ways and Means, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973*, 93 Cong., 1st Sess. (1973) 24
Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law and Pol. Int'l Bus. 327 (1975) 39
Note, 4 Law & Pol. Int'l Bus. 146 (1972) 29
Note, 12 Va. J. Int'l L. 277 (1972) 29
31 Op. Att'y Gen. 545 (1910) 12
Protocol of Provisional Application of the General Agreement on Tariffs on Trade, 61 Stat. A2051 (1947) 38

Page

S. 3964, 92d Cong., 2d Sess., 118 Cong. Rec. 29695 (1972) 29
S. Rep. No. 92-1221, 92d Cong., 2d Sess. (1972) .. 30, 31, 32
S. Rep. No. 92-1298, 92d Cong., 2d Sess. (1972) 31
S. Rep. No. 93-1298 93d Cong., 2d Sess. (1974) .. 25, 26, 27, 28, 32, 34, 35
Staff of Senate Comm. on Finance, *Staff Analysis of Certain Issues Raised by the General Agreement on Tariffs and Trade*, 91st Cong., 2d Sess. (1970) 42
Sturm, *A Manual of Customs Law* (1974) 11
4 Weekly Comp. Pres. Docs. 25 (1968) 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the
United States Court of Customs and Patent Appeals

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Customs Court (C.D. 4691) and the concurring opinions are reported at 430 F. Supp. 242, 78 Cust. Ct. 59, and Customs Bulletin and Decisions of May 11, 1977, page 44. These opinions are reproduced in Appendix A to the petition for certiorari (App. A to pet.), pages 1a-50a. The judgment of the Customs Court is reproduced in Appendix B to the petition for certiorari (App. B to pet.), pages 53a-54a.

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1195) and the dissenting opinion are reported at 562 F.2d 1209, 64 C.C.P.A. ——, and Customs Bulletin and Decisions of August 17, 1977, page 6. These opinions are reproduced in Appendix C to the petition for certiorari (App. C to pet.), pages 57a-112a.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. A petition for certiorari was filed on October 11, 1977, and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1256 (1970).

STATUTES INVOLVED

Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303 (Supp. V 1975); *see* Appendix to this Brief (App. to brief) for full text, pages 4a-9a):

"§ 1303. Countervailing duties.

"(a) Levy of countervailing duties.

"(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has

been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d) (Supp. V 1975); *see* App. to brief for text, pages 12a-13a).

QUESTIONS PRESENTED

1. Whether a bounty or grant within the purview of section 303 of the Tariff Act of 1930, as amended, is paid or bestowed when the Japanese Commodity Tax, which is imposed upon certain consumer electronic products sold in Japan, is not imposed upon such products exported to the United States.

2. Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303.

STATEMENT

Background

On April 3, 1970, petitioner, a domestic manufacturer of various consumer electronic products, filed with the Commissioner of Customs a petition under section 303 of the Tariff Act of 1930, seeking the assessment of countervailing duties on certain consumer electronic products from Japan since such products (in addition

to being bountied by other means) are exempt from a so-called "commodity tax" when exported. App. 8, 30, 139, 145-147.[1] The petition was met with inordinate delay by the Treasury Department and, in fact, it was not until Congress "forced" the Department to act that a final determination was issued on January 7, 1976.[2] 41 Fed. Reg. 1298 [App. 24-25]. Treasury then determined that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." App. 25. No reason was given why the forgiveness of the commodity tax on exportation did not constitute a bounty or grant.

[1] The essential facts regarding the commodity tax are not in dispute. The relevant Japanese law, the Commodity Tax Law, Law No. 48 of 1962, imposes a single-stage commodity tax upon a manufacturer's shipment of specified electronic (and other) products for consumption in Japan. The same products are exempt from the tax when shipped for export. A tax paid on a shipment for home consumption is refunded if that shipment is later exported. App. 12-14, 30-31.

The Court of Customs and Patent Appeals said in its opinion below: "We employ 'remission' to denote both tax exemption and tax refund, which are legally indistinct on this appeal." App. C to pet., page 58a n. 4. We make the same usage in this brief.

[2] On January 3, 1975, Congress enacted the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975). Section 331(a) of the Trade Act amended the countervailing duty statute, by, among other things, requiring the Secretary of the Treasury to make a final determination as to whether or not any bounty or grant is being paid or bestowed within twelve months from the date on which a petition is filed. Section 331(d) of the Trade Act provided, in effect, that with respect to investigations in progress on the date of enactment of the Trade Act, a final determination would have to be made within twelve months of the day following the date of enactment.

Decision of the Customs Court

Pursuant to the recently enacted subsection (d) of section 516 of the Tariff Act of 1930 (19 U.S.C. § 1516 (d) (Supp. V 1975)), petitioner commenced suit in the Customs Court to challenge the negative determination of the Secretary of the Treasury.

After issue was joined,[3] each side moved for summary judgment. Petitioner contended that, as a matter of law, the forgiveness of the commodity tax on the exportation from Japan of the subject electronic products constitutes the direct or indirect payment or bestowal of a bounty or grant cognizable under section 303. The Government, on the other hand, contended that, as a matter of law, the tax forgiveness on exportation does not constitute a bounty or grant. Further, upon application by the Government, a three-judge panel was convened pursuant to 28 U.S.C. § 255 (1970).

The Customs Court rendered its decision and judgment on April 12, 1977, in favor of petitioner. Relying significantly upon *Downs* v. *United States*, 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), the Court (per Richardson, *J.*, Newman, *J.*, and Boe, *J.*) unanimously held that the forgiveness of the Japanese commodity tax on exportation constituted the conferral of a bounty or grant under section 303, as a matter of law. Each of the three judges wrote a separate opinion. App. A to pet., pages 1a-16a; 16a-38a; 38a-50a.

[3] In its complaint, petitioner contested the negative countervailing duty determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes. App. 12.

In its order (judgment), the Customs Court directed the Secretary of the Treasury "to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order." App. B to pet., page 53a.

Decision of the Court of Customs and Patent Appeals

On April 15, 1977, the Government filed a timely appeal with the Court of Customs and Patent Appeals. App. 152-154. On July 28, 1977, that Court, in a 3-to-2 decision, reversed the decision and judgment of the three-judge Customs Court. Writing for the majority, Chief Judge Markey indicated that the language in *Downs* relied upon by the Customs Court was *dicta* and did not have to be followed, that the Treasury Department had a long-established practice of not countervailing "nonexcessive" tax remissions, that Congress acquiesced in this practice, and that the Secretary of the Treasury had "presumably determined" that the economic result of the tax remission is not a countervailable benefit. App. C to pet., pages 57a-84a. The Court directed that summary judgment be entered for the Government.[4] Judge Miller, writing

[4] In addition to arguing that the tax remission was not a bounty or grant, the Government contended on appeal that the Customs Court should not have ordered the assessment of countervailing duties on imports entered or withdrawn from warehouse for consumption before the publication of that Court's decision in the Customs Bulletin (May 11, 1977). The Court of Customs and Patent Appeals did not reach this issue. *See* App. C to pet., page 59a n. 8.

for himself and Judge Baldwin in dissent, observed that the key language of *Downs* was not *dicta* but was basic to this Court's decision, that *Downs* prevails over any administrative practice, that Congressional acquiescence in such practice is a myth, and that the controlling question is a matter of law and not a factual inquiry into economic result. App. C to pet., pages 84a-112a.

SUMMARY OF ARGUMENT

It has been held by this Court in *Downs,* in 1903, and reaffirmed in *Nicholas,* in 1919, that the remission of a tax upon the exportation of articles which are subjected to tax when sold or consumed in the country of their production is a bounty or grant within the purview of our countervailing duty law. The statute construed in *Downs* has been repeatedly reenacted without significant change, thereby demonstrating a Congressional ratification of this Court's construction. Thus, it follows that remission of the Japanese commodity tax on the exportation of the subject consumer electronic products is a bounty or grant and must be countervailed with offsetting duties.

That the Treasury Department has developed a practice of not countervailing "nonexcessive" remissions of indirect tax on exportation is without moment, being in conflict with rulings of this Court. Further, contrary to the conclusion reached by the Court below, Congress did not acquiesce in the Treasury Department's prac-

tice. In 1950, when, for the first time, the practice was brought to Congress' attention, Congress refused to comply with the Treasury Department's request to amend the statute and codify the practice, after having been advised of the possible conflict between the practice and judicial rulings. By the time of the enactment of the Trade Act of 1974, in 1975, Congress had become aware of numerous deficiencies in the manner in which the Treasury Department administered the countervailing duty law, including the continuing failure to follow this Court's rulings regarding tax remission. Congress responded to this situation by refusing to express ratification of the Treasury's practice, by placing strict limitations on the discretion exercisable by the Secretary of the Treasury, and by greatly enhancing the rights and remedies of American manufacturers under the countervailing duty law in order to assure the effective protection that that clear and mandatory law was intended to provide.

Finally, it was erroneous for the Court below to have failed to appreciate that the controlling question is a matter of law and not a factual inquiry into "economic result" of the commodity tax remission. The Court compounded its error by having based summary judgment on presumed facts, *viz.*, that the Secretary of the Treasury made a determination that the economic result of the Japanese tax remission is not the conferring of a countervailable benefit. Not only was this reliance on presumption improper on procedural grounds, but clearly that which was presumed did not occur. On the contrary, the Secretary of the Treasury and other officers of the Executive Branch have long recognized the export subsidy and trade distortive effects of indirect tax remissions on exportation.

ARGUMENT

I. This Court Has Ruled That the Remission of a Tax on Products Exported to the United States When Such Products Are Subject to Tax in Their Country of Production Constitutes a Bounty or Grant Under the Countervailing Duty Law, and This Ruling Has Been Ratified by Congress.

Section 303 of the Tariff Act of 1930, as amended, provides in pertinent part:

> "(a) Levy of Countervailing Duties.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

This language has remained substantially unchanged since the first countervailing duty statute of general application was enacted in 1897.[5] The law has been twice construed by this Court: in 1903 (*Downs, supra*)

---

[5] Tariff Act of 1897, § 5, 30 Stat. 151, 205. For text of statute, *see* App. to brief, page 1a.

and in 1919 (*Nicholas, supra*). In each case, this Court taught, generally, that the scope of the statute was extremely broad and, specifically, that the remission of taxes by foreign countries upon the exportation of articles which are subjected to a tax when sold or consumed in the country of production constitutes the conferral of a bounty or grant within the contemplation of the statute.

The *Downs* case, as correctly summarized by Judge Richardson, speaking for the Customs Court,

> "involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):
>
> 'The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation'." [App. A. to pet., page 6a.]

The majority of the Court of Customs and Patent Appeals considered the foregoing quotation from *Downs* as *dicta,* and stated that this Court really held that the tax remission in conjunction with the other features of the Russian scheme bestowed a bounty. App. C to pet., pages 60a-66a. We respectfully disagree. We submit that the three-judge majority of the Court of Customs and Patent Appeals engaged in an absolutely impermissible reading of this Court's opinion, which reading conflicted not only with the plain meaning of what this Court said but with readings given to the *Downs* opinion by a veritable host of authorities.[6]

---

[6] General Appraiser Somerville, speaking for the Board of General Appraisers (predecessor to the Customs Court), in *Wessels & Bro.* v. *United States,* 6 Treas. Dec. 319, 320-321, T.D. 24355 (Bd. Gen. App. 1903); General Appraiser Somerville, speaking for the Board of General Appraisers in *F. W. Meyers & Co.* v. *United States,* 6 Treas. Dec. 260, 265, T.D. 24306 (Bd. Gen. App. 1903); Attorney General Wickersham, in 31 Op. Att'y Gen. 545, 556 (1910); General Appraiser Hay, speaking for the Board of General Appraisers in *Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, 63-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); Mr. Justice McKenna, speaking for this Court, in *Nicholas & Co.* v. *United States,* 249 U.S. 34, 41 (1919); Assistant Attorney General Hanson in the Government's brief before this Court, in *Nicholas, supra,* at 38; Judge Maletz, speaking for himself and Judges Watson and Re (now Chief Judge), of the Customs Court in *Hammond Lead Products, Inc.* v. *United States,* 306 F.Supp. 460, 465-467, 468 (Cust. Ct. 1969), *reversed on jurisdictional grounds,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Almond, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024, 1035 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Richardson, speaking for himself and Judge Landis, of the Customs Court in *American Express Company* v. *United States,* 332 F. Supp. 191, 197-200 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973); Sturm, *A Manual*

As Judge Miller correctly observed in his dissenting opinion (*see* App. C to pet., pages 91a-95a), this Court regarded the remission of excise taxes upon exportation as a bounty or grant and the conferral of certificates to exporters as an *additional* bounty or grant. The Board of General Appraisers, whose opinion had been adopted by the Fourth Circuit, concluded that bounties or grants had been bestowed for two separate reasons: (1) the remission of tax and (2) the issuance of the certificates. *Downs* v. *United States,* 4 Treas. Dec. 405, T.D. 22984 (Bd. Gen. App. 1901), *aff'd;* unpublished (C.C. Md. 1901), *aff'd,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). In his brief before this Court, Downs advised that the grounds of the decision of the Circuit Court of Appeals were twofold, *viz.*:

> "FIRST.—That the remission of the excise tax, upon the exportation of the sugar, was a bounty or grant within the scope of Section Five.
>
> "SECOND.—That the issuance to the exporter of a certificate which had a substantial market value operated as a bounty or grant upon exportation." [Downs' brief, 5.]

Downs argued that *neither* constituted the conferral of a bounty or grant on exportation; the Government joined issue on both points; and this Court resolved the issues presented to it.

Downs expressly addressed himself to the tax remission issue in Point Five of his argument, entitled,

---

of Customs Law 415-417 (1974); Judges Richardson, Newman, and Boe of the Customs Court and Judge Miller, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in this case.

"The remission of excise taxes on the exportation of sugar is not a bounty or grant on exportation as the terms are used in Section five." [Downs' brief, 43 *et seq.*] Among other things, Downs argued (*id.* at 45):

> "To maintain that a drawback is a bounty is equivalent to saying that an omission to tax is a bounty. The fact that goods are exported free from tax does not make them bounty-fed as regards the foreign market. On the contrary unless the excise tax be remitted on export *it becomes an export duty when the goods are sold abroad.*" [Emphasis in original.]

The Government stated in response (brief, 23-24, 25):

> ". . . [I]f a foreign government should object to our drawbacks or remission of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive *legal* ground for resisting simply because it was an ordinary tax remission or drawback in our own municipal system. . . .
>
> * * * *
>
> ". . . For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty." [Emphasis in original.]

In resolving the issues raised by the parties, this Court considered both the remission of excise taxes upon exportation and the issuance of certificates to

exporters.' As noted by Judge Miller (App. C to pet., pages 91a-92a), the basis of the Court's decision "rested on its interpretation of the key statutory language, particularly the term 'bounty'." Thus, the Court explained (187 U.S. at 502):

> "A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1895, allowing a bounty upon the production of sugar, and Rev. Stat. §§ 3015-3027 [U.S. Comp. Stat. 1901, pp. 1989-1994], allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant*, 169 U.S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219."[8]

---

[7] The amount of bounty or grant was not in dispute. *See Downs, supra*, 4 Treas. Dec. at 406; *Downs* v. *United States*, 113 F. 144, 146 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903).

[8] The opinion in *United States* v. *Passavant*, 169 U.S. 16 (1898), was relied upon by this Court in both landmark countervailing duty cases, *Downs* and *Nicholas*. Although *Passavant* did not involve countervailing duties, it did involve a German tax remission scheme (concerning cotton velvets) similar to that existing under the subject Japanese Commodity Tax Law. The question before the Court was whether the price in the home market, which included a tax, or the price for export, which did not include such tax (since the tax was forgiven on exportation) constituted the dutiable value, *i.e.*, the statutory "actual market value or wholesale price."

The Court chose the former. It found that the actual market value was the price charged in the home market. It viewed the export price as essentially a contrived price, stating (169 U.S. at 22): "Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback." Elsewhere, in its opinion, the Court described this remission of tax as "a special advantage extended by the government in aid of manufacturers and trade." *Id.* at 23.

The Court proceeded to apply this interpretation to the Russian Government's remission of excise taxes on exportation, in the language quoted by Judge Richardson, *supra*, to wit:

> "The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation." [187 U.S. at 515.]

That the Court *also* found the issuance of the certificates to constitute an export bounty, 187 U.S. at 516, certainly does not relegate its clear and forcefully stated rule on tax remission to *dictum* or to something less than *ratio decidendi*.[9] *See, e.g., Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948).

Indeed, it is interesting to note that in *Wessels & Bro.* v. *United States*, 6 Treas. Dec. 319, T.D. 24355

---

[9] Further, the Court's earlier interpretation of the term "bounty" as including remission of tax, being basic to its conclusion, cannot be regarded as *dictum* either. *See Eisner* v. *Macomber*, 252 U.S. 189, 204-205 (1920).

(Bd. Gen. App. 1903), two months after this Court's *Downs* decision, the Board of General Appraisers rendered a decision in a case presenting the identical issue involved in *Downs*. Speaking for the Board, General Appraiser Somerville, *who had written the Board's opinion in Downs,* described the *Downs* case as follows (6 Treas. Dec. at 320):

> "The question thus presented is identical with that discussed in Downs' case, G.A. 4912 (T.D. 22984), decided April 19, 1901, in which we held as follows: * * * that the Russian Government pays or bestows a bounty or grant upon the exportation of so-called 'free sugar' so as to work a benefit or advantage to the exporter *in two ways* (a), by remitting or refunding the excise tax due upon the sugar, and (b) by issuing to the exporter a certificate of exportation, carrying with it a privilege of exemption from taxation, which certificate is transferable and has a substantial market value." [Emphasis added.]

General Appraiser Somerville then proceeded to demonstrate his understanding that this Court in *Downs,* had reached the same conclusions as the Board. *Id.* at 320-321.

After *Downs* (and *Wessels* and *Meyers* [10]), Congress reenacted the countervailing duty statute in 1909 and 1913.[11] It was the 1913 law that was construed by this Court in the *Nicholas* case, in 1919. The principal issue

---

[10] *See* n. 6, *supra.*

[11] Tariff Act of 1909, § 6, 36 Stat. 11, 85; Tariff Act of 1913, § IV, paragraph E, 38 Stat. 114, 193. The 1909 statute extended the Act's coverage to export bounties or grants paid or bestowed by any "province or other political subdivision of government." The 1913 version was identical to the 1909 version.

in *Nicholas* was whether a payment made for the purpose of compensating exporters for certain expenses incurred could be properly construed as a bounty or grant, as the Secretary of the Treasury had determined. In that case, the British Government, in addition to relieving exporters of spirits of the burden of certain excise taxes, which would have been collected had the spirits been sold for domestic consumption, made an allowance to exporters of 3 pence or 5 pence per gallon, depending on the spirits exported. Relying heavily on the *Downs* opinions, the Board of General Appraisers found the allowance to constitute a bounty or grant. *Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919). While the Board, at the conclusion of its opinion, stated that the issue of whether the remission of the ordinary excise tax constituted an export bounty was not before it and need not be decided, the Board clearly inferred that it held the view that such remission constituted the payment of a bounty. 29 Treas. Dec. at 65; *see also id.* at 63, 64 (citing and relying on *Downs*).

The Court of Customs Appeals, in affirming, also noted that the status of the tax remission was not put in dispute, but, nonetheless, in holding that the allowance was an export bounty, relied significantly on *Downs. Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 104, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919). When the case reached this Court, petitioners attempted to subvert the *Downs* ruling by arguing that this Court did not hold that the remission of an excise tax on exported sugar constituted a bounty, but rather that the value of the certificates constituted a bounty. Petitioners' brief, 45-46.

Interestingly, the Government, after expressing considerable reliance upon and quoting extensively from this Court's *Downs* opinion, responded as follows (brief, 38):

> "The Russian bounty case was summed up in a single sentence in the opinion (187 U.S. 515):
>
> > 'When a tax is imposed on all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation'." [12]

In affirming the decision of the Court of Customs Appeals, this Court not only gave the countervailing duty statute a broad reading,[13] but it supported its

[12] Immediately following, the Government argued (quoting from this Court's *Downs* opinion) (brief, 38-39):

> "The British allowance is paid directly to exporters upon their exportation of potable spirits. The allowance 'by creating a foreign demand, stimulates an increased production to the extent of such demand.' The allowance 'opens to the manufacturer a foreign market for his merchandise produced in excess of the demand at home.'
>
> "The controlling factor is the effect or result of the operation of the foreign law. Neither the name ascribed by the foreign government to the payment nor the method of payment is controlling."

[13] For example, this Court stated (249 U.S. at 39):

> "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

Further, this Court explained that a situation where goods could be sold cheaper in the United States than in the place of their production as a result of an act of Government because their destination was a foreign market was one which the statute intended to cover. *Ibid.*

conclusion by referring to the example of indirect bounty given in its *Downs* opinion, *i.e.*, "the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production." 249 U.S. at 41. Thus, in *Nicholas*, the *Downs* teaching was reaffirmed by this Court and the statute was again reenacted, with changes not here relevant, in 1922, 1930, and 1975.[14]

In brief, this Court has held that the remission of tax upon exportation is a bounty or grant within the countervailing duty law. By reenactment of the statute after *Downs* (and *Nicholas*), Congress has ratified such construction. *See, e.g., Shapiro* v. *United States*, 335 U.S. 1, 16 (1947); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). The majority of the Court below simply chose to read out of the body of our law the only decisions of this Court ever rendered on the subject, and, in doing so, reached the incorrect conclusion that the remission of the Japanese commodity tax on exportation is not a bounty or grant.

II. Congress Did Not Acquiesce in Any Treasury Department Practice to Countervail "Excessive" Tax Remissions Only.

After having incorrectly dismissed this Court's specific holding regarding tax remissions and after having ignored this Court's teachings regarding the meaning and scope of "bounty or grant", the majority below

[14] Tariff Act of 1922, § 303, 42 Stat. 858, 935; Tariff Act of 1930, § 303, 46 Stat. 590, 687; Trade Act of 1974, § 331(a), 88 Stat. 1978, 2049 (1975), amending section 303 of the Tariff Act of 1930. [In 1922, the statute's coverage was broadened to include bounties or grants on manufacture or production, and paid or bestowed by private entities.]

proceeded to conclude that Congress acquiesced in the Treasury Department's administrative practice of countervailing only "excessive" remissions of tax on export—"*i.e.*, the governmental giving of something above and beyond mere excise tax remission." App. C to pet., page 74a. However, any such acquiescence, as the dissent demonstrated, is a myth.

According to the record, the first specific notice to Congress (of the administrative practice) came in 1950 (rather than 1949, as stated by the Court below, App. C to pet., page 77a), when the Treasury Department sought specific legislation which would have legitimatized the practice. H.R. 8304, 81st Cong., 2d Sess., § 2 (1950).[15]

The purpose of the proposed amendment was expressed in the Department's analysis which reported the following (*Analysis of Customs Simplification Act of 1950*, 5):

> "* * * Subsection (c) would also add a provision that countervailing duty shall not be levied because of the ordinary remission or refund of taxes and duties allowed on exportation by most nations, including the United States. Under the existing administrative interpretation of section 303 of the Tariff Act, countervailing duty is not imposed in such situations, but some judicial comments on the statutes do not make it clear that the courts would consider such duty or tax exemptions as outside the scope of the countervailing duty provision. The proposed amendment eliminates the possibility of rulings in conflict with the administrative practice which has been followed for over 50 years."

[15] Section 2 of the bill provided that section 303 of the Tariff Act of 1930 would be amended by the addition of the following language: "* * * The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section."

Congress rejected the proposal.[16]

Remarkably, the Court below found that this refusal to amend the law indicated approval of the administrative practice, or at least "a then-current willingness to allow that administrative practice to continue unabated and unchanged." App. C. to pet., page 78a. We respectfully submit that the contrary should have been inferred. As Judge Newman correctly observed (App. A to pet., page 26a):

> "It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law."

[16] H. R. 8304 was replaced by H. R. 1535, 82d Cong., 1st Sess. (1951), which in turn was supplanted by H. R. 5505, 82d Cong., 1st Sess. (1951). At Senate Finance Committee hearings on H. R. 5505, Senator O'Mahoney spoke against the proposal, identifying it as an "attempt by law to reverse the present rule." *Hearings on H. R. 5505 Before the Senate Comm. on Finance*, 82d Cong., 2d Sess. 266 (1952). He proceeded to say (*ibid*):

> "I have not had the opportunity to examine all of the cases, but I have been given to understand, and I understand, that the courts have, without variation, held that such an exemption or such a refunding is a bounty or grant. So here we have an explicit request to reverse that rule."

H. R. 5505 was not reported out of the Finance Committee.

The majority below also looked to events of (February) 1968—testimony before the Senate Finance Committee advising of Treasury's practice to consider section 303 inapplicable to "nonexcessive" remissions of excise taxes—and reasoned that Congress' failure to take legislative action afterwards was further evidence of acquiescence. However, Congress did take action. *See* dissent, App. C to pet., pages 105a-106a. Further, in June 1968, the Ways and Means Committee of the House of Representatives received testimony from domestic steel industry spokesmen that notwithstanding the Treasury Department's refusal to apply countervailing duties to offset remissions of indirect taxes on exports, in disregard of decisions of this Court, the countervailing duty law does not have to be amended—just followed. *See Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means,* 90th Cong., 2d Sess. 2211-28, *esp.* 2225-26 (1968).

Indeed, in May 1971, Joseph S. Wright, then Chairman of the Board of the petitioner, made similar remarks before the Súbcommittee on International Trade of the Senate Finance Committee.[17] In his written statement submitted on May 17, 1971, petitioner's Mr. Wright advised the Subcommittee of Japanese subsidy practices, of the pendency of petitioner's countervailing duty petition (then over a year old), of the Treasury Department's reluctance to be guided by decisions of this Court, and of the consequent need for new legislation, *not amending the substance of the countervailing duty law but providing for time limits and judicial review. Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 109, 110-111 (1971). [The written statement, as reprinted in *Hearings on World Trade and Investment Issues, supra,* at 104-118, appears at App. 52-77.] Mr. Wright's remarks were well received by the Subcommittee Chairman, Senator Ribicoff. *Hearings on World Trade and Investment Issues, supra,* at 102. In 1975, when the relevant statutes were amended by the Trade Act of 1974, the very recommendations made by petitioner's Chairman were put into place.[18] *See* 19 U.S.C. §§ 1303(a)(4) and 1516 (Supp. V 1975).

---

[17] The Subcommittee had just been formed. In the Senate Finance Committee's press release of March 31, 1971, announcing the formation of the Subcommittee, the Committee Chairman, Senator Long, stated, "I would hope that the Subcommittee's inquiry will include an examination of nontariff barriers, and other matters, such as . . . [t]he border tax-export rebate system of the EEC, and the reasons why indirect tax rebates on exports are not considered 'bounties or grants' within the meaning of the countervailing duty statute as interpreted by Supreme Court cases." *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 7, 11 (1971). Shortly thereafter, on May 14, 1971, the Committee staff submitted a paper entitled *Foreign Trade—A Survey of Current Issues to be Studied by the Subcommittee on International Trade of the Committee on Finance, United States Senate,* reprinted in *Hearings on World Trade and Investment Issues, supra,* at 887, in which the following was stated (*id.* at 902):

> "The countervailing duty law was written to offset the subsidy effect on such devices as the European rebate of indirect taxes on exports. Yet, the law has not been applied in this area even though couched in mandatory terms. A case has been pending on this issue for over two years before the Treasury Department, which appears unwilling to make a decision. If the laws are not adequate or too harsh they should be changed, rather than left as 'dead letters' on the statute books."

[18] Inasmuch as footnote 26 of the majority's opinion below suggests otherwise, it is erroneous. App. C. to pet., page 79a.

Furthermore, when Congress considered what was to become the Trade Act of 1974, Treasury's "practice" under section 303 of applying a "directly related" test to tax remissions was brought to Congress' attention. The Executive Branch proposed an amendment to section 203 of the Antidumping Act of 1921, 19 U.S.C § 162 (1970) (amended 1975), and explained its purpose as follows (House Comm. on Ways and Means, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973,* 93d Cong., 1st Sess. 89-90 (1973)):

> "The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.
>
> "The Treasury Department considers rebates or remissions of taxes not directly related to an exported product or its components as being bounties or grants within the meaning of the countervailing duty law. Under the Antidumping Act, Treasury is required in its calculation of purchase price to add back to the price at which merchandise is sold to the United States 'the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, *in respect to the manufacture, production, or sale of the merchandise,* which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.'

> (Emphasis added [by author of press release].) The 'adding back' of such taxes under the Antidumping Act would have the effect of reducing or eliminating any dumping margins that may exist. The language of the Antidumping Act 'in respect to the manufacture, production or sale of the merchandise' is somewhat broader than the standard applied to tax rebates under the countervailing duty law (directly related to the exported products or its components) and could result in inconsistency of treatment of tax rebates under the two laws."

Although Congress eventually adopted the proposed amendment (with some modification) the House Ways and Means Committee took pains to point out the following (*H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973)):

> "The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes."

The Senate Finance Committee made a similar statement (*S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974)):

> "The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice."

Thus, the key committee of each chamber of the Congress explicitly stated that it was not ratifying Treasury's practice.

Nevertheless, the Court below viewed the Congressional failure to provide specifically for the assessment of countervailing duties to offset "nonexcessive" indirect tax remissions on exports as evidence of acquiescence in the Treasury Department's practice. We respectfully submit that this view is unsustainable. Congress did not wish to address itself to *specific* subsidy practices in the Trade Act, but instead expressed the wish "that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties." 19 U.S.C. §1303 (d)(1) (Supp. V 1975). *See also* 19 U.S.C. §2112 (Supp. V 1975). To assist the Executive Branch in its negotiating efforts, Congress even gave *limited* discretionary authority [not invoked herein] to the Secretary of the Treasury not to countervail bounties or grants, under certain well-defined circumstances and subject to close Congressional review. 19 U.S.C. §1303 (d)(2) and (3) (Supp. V 1975).

However, by giving the Executive Branch the power to negotiate, Congress was not diluting the substantive law nor giving the Executive Branch carte blanche to ignore the mandate of the law. *See S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 187 (1974). Indeed, the Trade Act that was eventually passed in 1975 differed markedly from the bill which the Executive Branch proposed in 1973. In the initial bill, H. R. 6767, 93d Cong., 1st Sess. §330 (1973), there was no *effective* provision for a

time limit for Treasury Department action (*see S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 183-184 (1974)); there was *no* provision for judicial review of negative countervailing duty determinations by American manufacturers; there *was* a provision giving the Secretary of the Treasury a broad discretion to refrain from ordering the assessment of countervailing duties under certain circumstances. Also, as noted, with respect to the amendment of the Antidumping Act, an effort was made by the Executive Branch to have Congress ratify Treasury's tax remission practice under the countervailing duty law. However, not only did Congress clearly say that it would not ratify the practice, but it greatly enhanced the rights and remedies of American manufacturers in countervailing duty proceedings and it greatly limited the discretion which the Treasury Department sought for itself. These developments, as we shall now show, are all clearly inconsistent with the conclusions of the Court below that there had been legislative acquiescence in the Treasury Department's practice and that Congress had conferred upon the Secretary of the Treasury a broad discretion to determine which actions or programs of foreign governments should be countervailed. *See* App. C to pet., pages 68a, 71a, 82a.

A. Time Limits. With respect to time limits, Congress required Treasury to reach a final determination within one year from the filing of a petition and, furthermore, it deemed all petitions pending at the time of enactment to have been filed on the day after the date of enactment. Sections 331(a) and 331(d), Trade Act of 1974. By taking this action, Congress wished to prevent the Treasury Department from pursuing

past practice "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974).[19]

B. Judicial Review. By providing for judicial review, Congress wished "to assure effective protection under the countervailing duty laws to American producers." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 185 (1974). This provision for review was enacted over the Treasury Department's objection,[20] and in direct response to a 3-2 decision of the Court of Customs and Patent Appeals in which it was determined that Congress had not wished to give American producers a judicial remedy in countervailing duty cases because of the thorny international problems that could result if the Secretary of the Treasury were compelled to countervail against his will. *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971). That Court had concluded that the Congress elected "to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries which have

[19] During the Ways and Means Committee hearings on H. R. 6767, the Congress had been advised of the unconscionable sluggishness with which the Treasury Department was handling petitioner's countervailing duty complaint. *See Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess. 3292-3293 (1973).

[20] *See Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess. 254 (testimony of Hon. George P. Shultz, then Secretary of the Treasury) (1973).

taken reasonable action, action our own Government takes or counsels." *Id.* at 1031.[21]

The Congressional response was swift and incisive. Congress was disturbed not only because of the denial to the American manufacturer of his day in court, but because of the judicial construction that Congress had conferred discretion on the Secretary, when in fact the countervailing duty law had been written in mandatory terms. On June 29, 1972, and September 7, 1972, bills were introduced in the House and Senate respectively to provide for judicial review by American manufacturers of negative countervailing duty determinations. H. R. 15794, 92d Cong., 2d Sess., 118 Cong. Rec. 23484 (1972); S. 3964, 92d Cong., 2d Sess., 118 Cong. Rec. 29695 (1972). In support of the House bill which he introduced, Congressman Fulton made it clear that he wished to overrule *Hammond Lead* and stated:

> "The effect of that case is to emasculate the countervailing duty law which is designed to offset the artificial competitive advantage of imported products over American-made products by virtue

[21] The legal commentators were quick to see *Hammond Lead* as being "responsive to the political and diplomatic exigencies concomitant with the imposition of duties rather than to the interests of domestic companies." Note, 12 Va. J. Int'l L. 277, 279 (1972). *See also* Note, 4 Law & Pol. Int'l Bus. 146, 155 (1972), where the following was observed:

> "In denying Hammond Lead the opportunity to be heard on the merits, the C.C.P.A. has disregarded the congressional intent underlying section 516(b). • • • Through this narrow approach, the court has deprived American manufacturers of an invaluable means of protecting their economic interests against the onslaught of those imported goods which have been benefitted by the producing country at the cost of competitive disadvantage for the American manufacturers."

of subsidies given in the exporting country. While the countervailing duty law is mandatory in its terms, the Hammond Lead decision forecloses effective relief to injured domestic producers where Treasury decides for *policy reasons* not to enforce the law or unreasonably delays enforcement." [118 Cong. Rec. 23883 (1972) (emphasis added).]

On the Senate side, Senator Fannin also expressed the desire to overrule *Hammond Lead,* and among other things, stated:

"[In view of *Hammond Lead*] we are faced with a situation where an importer has the right to judicial review under the statute but a domestic manufacturer is denied his day in court.

"The amendment that is being introduced today would enable our domestic producers to begin using effectively an instrument that we have already on hand [the countervailing duty statute], one designed for the sole purpose of insuring fair competition." [118 Cong. Rec. 29698 (1972).]

On September 27, 1972, the Senate tacked onto a minor House-passed tariff bill an amendment providing the judicial review sought in the other two bills mentioned. *See* 118 Cong. Rec. 32413-16 (1972). In reporting out the amended bill, the Senate Finance Committee had made the following significant remarks (*S. Rep. No. 92-1221,* 92d Cong., 2d Sess. 8 (1972)):

"The Committee amendment providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*) holding that judicial review was not available to American producers in countervailing duty cases.

The Committee is concerned that that decision might adversely affect the ability of American producers to obtain meaningful relief against subsized [*sic*] import competition under the Countervailing Duty Law (section 303 of the Tariff Act) because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.

"In addition, importers enjoy the right to judicial review in countervailing duty cases under existing law. The Committee believes that American producers as well as importers should be permitted to have the right to judicial review in countervailing duty cases as a matter of basic equity and fairness, and *as a means to secure administration of the law in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303.*

"The Countervailing Duty Law requires the Secretary of the Treasury to assess an additional duty on imports of dutiable articles with respect to which a bounty or grant has been paid. The additional duty must be equal to the amount of the bounty or grant, thereby neutralizing the artificial advantage afforded the foreign product by virtue of the subsidy. Consequently, countervailing duties are not, nor were they ever intended to be, penal in nature: they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded foreign merchandise." [Emphasis added.]

Although the amendment was accepted by the House-Senate conferees (*H. R. Rep. No. 92-1583,* 92d Cong., 2d Sess. (1972); *S. Rep. No. 92-1298,* 92d Cong., 2d Sess. (1972)), the bill was not brought to a vote in the House as an accommodation to the Secretary of the Treasury, with the understanding that the matter would be given attention in the context of trade legis-

lation in the next Congress. *See* 118 Cong. Rec. 37098 (1972).

While the Executive Branch's trade legislation proposal of April 1973 contained no provision for judicial review of negative countervailing duty determinations, Congress provided one in the Trade Act.[22]

C. Limitation on Discretion. Finally, as noted, Congress explicitly limited the discretion of the Secretary of the Treasury. The trade bill proposed by the Executive Branch in 1973 contained a provision which would have given the Secretary the discretion to refrain from ordering the assessment of countervailing duties if he determined that the imposition of such duties would result or be likely to result in significant detriment to the economic interests of the United States. H. R. 6767, 93d Cong., 1st Sess., § 330 (1973). App. to brief, pages 22a-23a. ***This proposal was rejected by Congress.*** The House of Representatives instead passed a bill which would have authorized the Secretary of the Treasury to suspend the imposition of countervailing duties if he determined that such imposition would be likely to seriously jeopardize the satisfactory completion of contemplated international trade negotiations. H. R. 10710, 93d Cong., 1st Sess., § 331 (1973).[23] ***However,***

[22] The House Ways and Means Committee expressed views similar to those that the Senate Finance Committee expressed in *S. Rep. No. 92-1221, supra,* in 1972. *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 76 (1973). In its 1974 report on the trade bill, the Senate Finance Committee was particularly emphatic in its discussion of the need to assure protection to United States producers against bounty-fed foreign competition. *See S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974).

[23] The purpose of this provision was explained by the Ways and Means Committee, as follows:

> "The 4-year temporary discretionary authority was accorded because of the very real danger that the mandatory provisions of section 303, combined with the committee's amendment providing for a 12-month time limit for action under this section, could compel the Secretary to take actions which might well frustrate the successful outcome of the forthcoming negotiations. The committee is aware that there are differences of opinion internationally as to what constitute permissible and nonpermissible export assists under international law and practice, and that the negotiation of an agreement on this issue may prove difficult. The committee has no desire to sanction certain existing export-assist practices conducted by various foreign governments. It also recognizes that the United States itself may well be conducting programs of export-assists which foreign governments may find inconsistent with international law and policy.
>
> "With this background, the Secretary of the Treasury must be temporarily accorded some degree of latitude in administering section 303 until an international agreement is reached regarding the international practices which would be considered permissible and nonpermissible. Otherwise the Secretary of the Treasury may conceivably be constrained to take countervailing action under section 303 against a practice which ultimately may be internationally agreed to be a permissible international export assist. The discretionary authority accorded herein has been restricted to 4 years to facilitate the international negotiations. It has been accorded on the understanding that the U.S. negotiators will report regularly to the Congress on the progress and ultimately on the outcome of the negotiations with respect to international export assists. The committee assumes that it may be necessary to further amend section 303 depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States." [*H.R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973).]

even this proposed grant of limited discretion was not found acceptable to the Senate, because it failed to protect sufficiently the needs of domestic industry. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 186 (1974). The Senate replaced the House proposal with a much more limited grant of discretion to postpone countervailing duty assessments. It was the Senate version which became law. *See* section 303 (d)(2) and (e) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(d)(2) and (e) (Supp. V 1975)).

Section 303(d)(2) provides:

> "If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—
>
> "(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;
>
> "(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and
>
> "(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;
>
> the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective." [24]

[24] In its report, the Senate Finance Committee stated with respect to this provision (*S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 187 (1974)):

> "Under the Committee bill, all three conditions must be met before the Secretary could waive the application of the countervailing duty. Under the Committee amendment, this temporary discretion in the application of the countervailing duty law could not be abused during the negotiations, *since* all three conditions would have to be met before such discretion could be exercised. The Committee believes this provision would be used sparingly since foreign countries should be encouraged to eliminate the bounty or grant during the six-month period following a positive preliminary determination and before the twelve-month period for a final determination." [Emphasis in original.]

Furthermore, any exercise of the "postponement" authority is subject to immediate review and revocation by either chamber of Congress. *See* section 303(e) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(e) (Supp. V 1975)).

In this setting, it is thus clear that Congress was not expressing ratification of or acquiescing in the Treasury Department's tax remission practice but rather clearly demonstrated its intent that, until further amended and absent the three specified conditions precedent to the invocation of the discretionary authority in section 303(d)(2), the countervailing duty law be enforced on the basis of the unambiguous statutory language and the case law construing it, and that American industry be protected from subsidized import competition. *See S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 33-34, 183-188 (1974).[25] The Court below, in perceiving a grant of discretion to the Secretary to

[25] As Judge Boe of the Customs Court correctly stated, "[t]o construe our recently enacted countervailing duty statute in conformity with the interpretation urged by the . . . [Government] not only would disregard the statutory intent of the Congress, but would thwart the very objective it seeks to attain through negotiation and agreement." App. A to pet., page 50a.

define countervailable bounties or grants, has grossly misread the statutory plan.[26]

III. The Secretary of the Treasury Did Not Make a Determination That the Economic Result of the Remission of the Commodity Tax Is Not the Conferring of Such a Benefit, Subsidy, or Incentive as Would Rise to the Level of a Bounty or Grant Under Section 303.

The majority of the Court of Customs and Patent Appeals did *not* decide that the forgiveness of an excise or indirect tax on exportation is not a bounty or grant as a matter of law.[27] Rather, it engaged in a *presumption* that the Secretary of the Treasury made a determination "that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." App. C to pet., 69a.

We respectfully submit that, since the remission of the commodity tax on exportation is a bounty or grant

[26] The view of the Court below that Congress, by not having defined "bounty" or "grant", intended to provide a "wide latitude within which the Secretary . . . may determine the existence or non-existence of a bounty or grant" is absolutely unsupportable. App. C to pet., pages 68a, 71a, 83a n. 33. Congress spoke in broad terms because it wished to reach all possible benefits falling within the common meaning of bounty or grant. *See* Judge Miller's dissent, App. C to pet., pages 89a-90a n. 7. Indeed, as this Court said in *Nicholas* (249 U.S. at 39):

> "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

[27] The majority stated: "Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us." App. C to pet., page 82a n. 32.

as a matter of law, any determination by the Secretary of the Treasury regarding "economic result" would be irrelevant. We submit further that the Court below compounded its error by presuming that such a determination was made. Not only was it improper on procedural grounds to have based summary judgment on presumed facts, but clearly, the presumed economic determination was not made. Rather, the Secretary's determination not to countervail was premised on the following considerations, described in the Government's brief in opposition to certiorari, at 7:

> "The Secretary has adopted a bright-line distinction [between remissions of direct tax, which are deemed countervailable, and remissions of indirect tax, which are not] in order to facilitate administration of the statute and to assist the conduct of foreign trade relations. That distinction, moreover, has been adopted by the General Agreement on Tariffs and Trade, to which the United States is a party, and is accepted as a fundamental principle by every major trading nation in the world." [Footnote omitted.]

We submit that not only do the relevant GATT[28] rules have no force and effect as domestic law (as the

[28] The General Agreement on Tariffs and Trade ("GATT"), 61 Stat. All (1947), contains a countervailing duty provision in Part II, Article VI. Unlike section 303 of the Tariff Act, Article VI of the GATT provides:

> "4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."

In 1955, the following was added to the GATT, as ad Article XVI of Annex I:

Government and the Courts below recognize) but an examination of said rules (and the indirect-direct tax distinction) will reveal that they (1) were premised on false assumptions, (2) provide for unfair rather than neutral treatment to nations, such as the United States, which depend primarily on direct taxes for revenue, and (3) have been soundly criticized by the United States for not being trade neutral and for favoring the exports of countries depending primarily on indirect taxes.

The GATT's permitting the remission of indirect taxes but not direct taxes on export was based, in part,

---

"The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." [1 GATT, *Basic Instruments and Selected Documents* [BISD], at 67 (1955).]

Subsequently, in a Working Party Report adopted by the contracting parties to GATT, practices which were considered to be deemed subsidies were "[t]he exemption, in respect of exported goods, of charges or taxes, other than charges in connexion with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connexion with importation or in both forms . . ." GATT, *Basic Instruments and Selected Documents* [BISD] 9th Supp., at 186-187 (1961).

It is not really disputed that these GATT rules play no role whatsoever in our domestic law. Not only has Congress never delegated any authority to the Executive Branch to amend the countervailing duty law, but when the United States acceded to GATT, it agreed to undertake the relevant part "to the fullest extent not inconsistent with existing legislation." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. A2051 (1947). *See American Express Company* v. *United States*, 472 F.2d 1050, 1059 n. 14 (C.C.P.A. 1973). *See also* opinions of Judges Richardson and Newman of the Customs Court in this case, App. A to pet., pages 13a-14a and 29a-30a, respectively, and the majority opinion of the Court below, App. C to pet., page 76a n. 21.

on theories of tax incidence, which held that the former (indirect taxes) shift fully forward, while the latter (direct taxes) were fully absorbed by the seller. Thus, the theory goes, whether a product is sold in a foreign country for home consumption at a price of $1.10, including a $.10 tax, or for export at $1.00, excluding such tax, the profit experienced by the seller would be the same in either transaction, and there would be no inducement to seek the export market. [Additionally, the GATT permits the border tax adjustment on imports, *i.e.*, the assessment of tax to place imports on "equal" footing with domestically produced and taxed merchandise. GATT, Articles II and III.]

There are at least two fundamental problems with the GATT plan. Firstly, it totally ignores the logic of this Court's teachings that the remission on export of a tax (or any other cost) encourages or facilitates the sale of a product in a new market. *Passavant, Downs, Nicholas, supra.* Secondly, the two underlying assumptions, *i.e.*, that indirect taxes shift fully forward and that direct taxes are fully absorbed by the seller have been demonstrated to be plainly false. *See, e.g.*, Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law and Pol. Int'l Bus. 327, 351-355 (1975). The United States, in particular, has repeatedly expressed its recognition that the assumptions were false and the results unfair. *See, e.g., The United States Submission on Border Tax Adjustments, February 16, 1966,* to Workng Party No. 4 of the Council on Border Tax Adjustments, Organisation for Economic Co-operation and Development. App. 93-116. In this submission, it was repeatedly noted that indirect taxes do not

shift fully forward into the price of products. At App. 95, the following analysis was offered:

> "[T]he imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. The price *net of tax* therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed combodity." [Emphasis in original.]

In his 1968 Balance of Payments Address, President Johnson focused on the very same problem (4 Weekly Comp. Pres. Docs. 25 (1968)):

> "We must now look beyond the great success of the Kennedy Round to the problems of nontariff barriers that pose a continued threat to the growth of world trade and to our competitive position. American commerce is at a disadvantage because of the tax system of some of our trading partners. Some nations give across-the-board rebates on exports which leave their port and impose special border tax charges on our goods entering their country.
>
> "International rules govern these special taxes under the General Agreement on Tariffs and Trade. These rules must be adjusted to expand international trade further."

In April of 1968, the Special Trade Representative made a statement on border taxes before a GATT Working Party which continued the United States assault

on the system. [Statement is reprinted in *Hearings on World Trade and Investment Issues, supra,* at 1005.] After pointing to the false assumptions pertaining to tax shifting, he stated (*id.* at 1008):

> "In summary, the present GATT provisions on border tax adjustments do not neutralize the effects of taxes on trade. Instead they are export promoting and import restricting for the indirect tax countries. The basic assumptions underlying the GATT provisions are not realistic. The full border tax adjustment provided for with respect to indirect taxes constitutes both an export subsidy and an import surcharge."

He went on to say (*id.* at 1010):

> "We question whether there is a sound conceptual basis for any general border tax adjustments."

Developing this theme, former Assistant Secretary of the Treasury, John R. Petty, detailed the dissatisfaction of the United States with the present GATT rules in a paper for the Twenty-first Annual Conference of the Canadian Tax Foundation, Toronto, November 20, 1968 [App. 117-138], where he stated:

> "Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality. While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports. In brief, the present provisions of GATT divert trade and thereby disadvan-

tage countries such as the United States and Canada which rely primarily on direct taxes." [App. 132-133; footnotes omitted.] [29]

In 1971, the Hon. John B. Connally, then Secretary of the Treasury, also acknowledged that the GATT rules on border tax adjustments made no sense. *Hearings on World Trade and Investment Issues, supra,* at 44-45.

In 1975, former Assistant Secretary of the Treasury David R. Macdonald stated at a press conference [copy of Transcript appears at App. 78-92], with respect to the United States Steel Corporation's complaint that the remission of value-added taxes (which he likened to the commodity tax—App. 87) constitutes a bounty or grant (App. 80):

"... I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this

[29] Earlier, Mr. Petty explained that the GATT rules were evidently developed without much concern for the consequences. He stated:

"Little wonder! In the late 1940's and early 1950's, border tax rates were low—in the range of 2% to 4%—and limited to around one-sixth of the goods traded—and then only in the case of a few nations. Furthermore, a seller's market existed in which demand was highly unresponsive to small price variations. Finally, the $10 billion commercial trade surplus of the United States in 1947 must have had an effect on the attitude of the United States' negotiators. This is best illustrated by the then-prevalent and understandable United States' policy of deliberately encouraging a transfer of financial assets to Western Europe in order to facilitate European reconstruction." [App. 123.]

To the same effect, see Staff of Senate Comm. on Finance, *Staff Analysis of Certain Issues Raised by the General Agreement on Tariffs and Trade,* 91st Cong., 2d Sess. (1970), reported in *Hearings on World Trade and Investment Issues, supra,* at 919.

sort. In fact, if there was one thing that was quite persuasive in the petition filed by U. S. Steel, it was their economic argument that, *in fact,* there should be no distinction between direct and indirect taxes.

"We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because the distinction between so-called 'direct' taxes and so-called 'indirect' taxes, economically speaking, may well be chimerical." [Emphasis in original.]

Thus, in view of all the foregoing, it is clear that the decision not to countervail was not predicated on economic analysis. Quite the contrary, the export subsidy and trade distortive effect of indirect tax remission has long been recognized by the Executive Branch.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the Court below should be reversed and the case should be remanded to enable that Court to decide the proper effective date for duty assessment purposes. *See* n. 4, *supra*.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

March 1978

Appendix

APPENDIX TO BRIEF

Statutes

Section 5 of the Tariff Act of 1897, 30 Stat. 151, 205:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 6 of the Tariff Act of 1909, 36 Stat. 11, 85:

That whenever any country, dependency, colony, province or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether

such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or other wise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section IV, paragraph E. of the Tariff Act of 1913, 38 Stat. 114, 193:

That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this act, then upon the importatation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1922, 42 Stat. 858, 935:

That whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 (1970) (amended 1975):

COUNTERVAILING DUTIES.

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of govern-

ment, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V 1975):

COUNTERVAILING DUTIES.

(a) *Levy of countervailing duties.*

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by

remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed.

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within six months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within twelve months from such date shall make a final

determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

(6) The Secretary shall make all regulations he deems necessary for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b)(1) or this section (whether affirmative or negative) shall be published in the Federal Register.

(b) *Injury determination with respect to duty-free merchandise; suspension of liquidation.*

(1) Whenever the Secretary makes a final determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2) of this section, he shall—

(A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication

in the Federal Register of his final determination under subsection (a) of this section, and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (3).

(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

(3) If the determination of the Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a) of this section.

(c) *Application of affirmative determinations.*

An affirmative final determination by the Secretary under subsection (a) of this section with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1) of this section.

(d) *Temporary provision while negotiations are in progress.*

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United

States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem apropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting

such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

(e) *Reports to Congress.*

(1) Whenever the Secretary makes a determination under subsection (d)(2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2192 of this title, then such determination under subsection (d)(2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

Section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. V 1975):

PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS.

(a) *Classification, rate of duty, countervailing duty, and antidumping duty furnished upon request; petition; contents.*

The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duties"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reason for his belief that countervailing duties or antidumping duties should be assessed.

(b) *Determination of petition; notification to petitioner; procedures for countervailing duties and antidumping duties.*

If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article

or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) *Determination of correctness of initial appraised value, classification, rate of duty, or non-assessment of countervailing duties or antidumping duties; contest by petitioner; procedure.*

If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties

should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) *Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.*

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(e) *Appraisal, classification, and liquidation of entries of merchandise covered by published decisions of the Secretary.*

Notwithstanding the filing of an action pursuant to section 2632 of title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) *Consignee or his agent as party in interest before the Customs Court.*

The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) *Appraisement, classification, and assessment of duty of merchandise covered by published decision of the Secretary in accordance with final judicial decision of Customs Court or Court of Customs and Patent Appeals sustaining cause of action in whole or in part; suspension of liquidation of entries.*

If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consump-

tion or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) *Regulations implementing required procedures.*

Regulations shall be prescribed by the Secretary to implement the procedures required under this section.

Section 102 of the Trade Act of 1974, 19 U.S.C. § 2112 (Supp. V 1975):

§ 2112. NONTARIFF BARRIERS TO AND OTHER DISTORTIONS OF TRADE.

(a) *Congressional findings; directives; disavowal of prior approval of legislation.*

The Congress finds that barriers to (and other distortions of) international trade are reducing the growth of foreign markets for the products of United States agriculture, industry, mining, and commerce, diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations. The President is urged to take all appropriate and feasible steps within his power (including the full exercise of the rights of the United States under international agreements) to harmonize, reduce, or eliminate such barriers to (and other distortions of) international trade. The President is further urged to utilize the authority granted by subsection (b) of this section to negotiate trade agreements with other

countries and instrumentalities providing on a basis of mutuality for the harmonization, reduction, or elimination of such barriers to (and other distortions of) international trade. Nothing in this subsection shall be construed as prior approval of any legislation which may be necessary to implement an agrement concerning barriers to (or other distortions of) international trade.

(b) *Presidential determinations prerequisite to entry into trade agreements.*

Whenever the President determines that any barriers to (or other distortions of) international trade of any foreign country or the United States unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy, or that the imposition of such barriers is likely to result in such a burden, restriction, or effect, and that the purposes of this chapter will be promoted thereby, the President, during the 5-year period beginning on January 3, 1975, may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions).

(c) *Presidential consultation with Congress prior to entry into trade agreements.*

Before the President enters into any trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such trade agreement. Such consultation shall include all matters

relating to the implementation of such trade agreement as provided in subsections (d) and (e) of this section. If it is proposed to implement such trade agreement, together with one or more other trade agrements entered into under this section, in a single implementing bill, such consultation shall include the desirability and feasibility of such proposed implementation.

(d) *Submission to Congress of agreements, drafts of implementing bills, and statements of proposed administrative action.*

Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementing bill (described in section 2191(b) of this title) and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in subsection (e) of this section, and such agreement shall enter into force with respect to the United States only if the provisions of subsection (e) of this section are complied with and the implementing bill submitted by the President is enacted into law.

(e) *Steps prerequisite to entry into force of trade agreements.*

Each trade agreement submitted to the Congress under this subsection shall enter into force with respect to the United States if (and only if)—

(1) the President, not less than 90 days before the day on which he enters into such trade agreement, notifies the House of Representatives and the Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(2) after entering into the agreement, the President transmits a document to the House of Representatives and to the Senate containing a copy of such agreement together with—

(A) a draft of an implementing bill and a statement of any administrative action proposed to implement such agreement, and an explanation as to how the implementing bill and proposed administrative action change or affect existing law, and

(B) a statement of his reasons as to how the agreement serves the interests of United States commerce and as to why the implementing bill and proposed administrative action is required or appropriate to carry out the agreement; and

(3) the implementing bill is enacted into law.

(f) *Obligations imposed upon foreign countries or instrumentalities receiving benefits under trade agreements.*

To insure that a foreign country or instrumentality which receives benefits under a trade agreement entered into under this section is subject to the obligations imposed by such agreement, the President may recommend to Congress in the implementing bill and statement of administrative action submitted with respect to such agreement that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement. The President may also recommend with respect to any such agrement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agrement.

(g) *Definitions.*

For purposes of this section—

(1) the term "barrier" includes the American selling price basis of customs evaluation as defined in section 1401a or 1402 of this title, as appropriate;

(2) the term "distortion" includes a subsidy; and

(3) the term "international trade" includes trade in both goods and services.

Section 331(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2049, 2053 (1975).

Amendments to Section 303 and 516 of the Tariff Act of 1930.

• • • • • • • • • •

(d)(1) The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) For purposes of applying the provisions of section 303(a)(4) of the Tariff Act of 1930 (as amended by subsection (a)) with respect to any investigation which was initiated before the date of the enactment of this Act under section 303 of such Act (as in effect before such date), such investigation shall be treated as having been initiated on the day after such date of enactment under section 303(a)(3)(B) of such Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).

Section 203 of the Antidumping Act of 1921, 19 U.S.C. § 162 (1970) (amended 1975):

Purchase price

For the purposes of this section and sections 160-171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased

or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

Unenacted Bills

H.R. 6767, 93d Cong., 1st Sess., § 330 (1973):

SEC. 330. AMENDMENTS TO SECTION 303 OF THE TARIFF ACT OF 1930.

(a) Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) is amended to read:

"SEC. 303. COUNTERVAILING DUTIES.

"(a) LEVY OF COUNTERVAILING DUTIES.—

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person,

partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

"The Secretary of the Treasury shall determine within twelve months after the date on which the question is presented to him whether any bounty or grant is being paid or bestowed.

"(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Tariff Commission under subsection (b)(1): *Provided, however,* That such a Tariff Commission determination shall be required only for such time as a determination of injury is required by the international obligations of the United States.

"(3) The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

"(4) Whenever, in the case of any imported article or merchandise as to which the Secretary has not determined whether a bounty or grant is being paid or bestowed, the Secretary concludes, from information presented to him or to any person to whom authority under this section has

been delegated, that a formal investigation into the question of whether a bounty or grant is being paid or bestowed is warranted, he shall forthwith publish notice of the initiation of such an investigation in the Federal Register. The date of publication of such notice shall be considered the date on which the question is presented to the Secretary within the meaning of subsection (a)(1).

"(5) The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of the duties under this section. All determinations by the Secretary under this subsection and all determinations by the Tariff Commission under subsection (b)(1), whether affirmative or negative, shall be published in the Federal Register.

"(b) INJURY DETERMINATIONS WITH RESPECT TO DUTY-FREE MERCHANDISE; SUSPENSION OF LIQUIDATION.—

(1) Whenever the Secretary of the Treasury has determined under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty, he shall—

"(A) so advise the United States Tariff Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be materially injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

"(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption, on or after the thirtieth day after

the date of the publication in the Federal Register of his determination under subsection (a)(1), and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (2) of this subsection.

"(2) If the determination of the Tariff Commission under subparagraph (A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a).

"(c) APPLICATION OF AFFIRMATIVE DETERMINATION.—

An affirmative determination by the Secretary of the Treasury under subsection (a)(1) with respect to any imported article or merchandise which (1) is dutiable, or (2) is free of duty and with respect to which the Tariff Commission has made an affirmative determination under subsection (b)(1) (for such time as a finding of injury is required by the international obligations of the United States), shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the thirtieth day after the date of the publication in the Federal Register of such determination.

"(d) DISCRETIONARY IMPOSITION OF COUNTERVAILING DUTIES.—

Whenever the Secretary determines, after seeking information and advice from such agencies as he may deem appropriate, that—

"(1) the imposition of an additional duty under this section upon any article would result, or be likely to result in significant detriment to the economic interests of the United States; or

"(2) that any article is subject to the a [*sic*] quantitative limitation imposed by the United States on its importation into, or subject to an effective quantitative limitation on its exportation to, the United States and that such quantitative limitation is an adequate substitute for the imposition of a duty under this section;

the imposition of an additional duty under this section shall not be required."

(b)(1) Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The last sentence of section 303(a)(1) of the Tariff Act of 1930 (as added by subsection (a) of this section) shall apply only with respect to questions presented on or after the date of the enactment of this Act.

(c) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title VI of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).

H.R. 10710, 93d Cong., 1st Sess., § 331 (1973):

SEC. 331. AMENDMENTS TO SECTIONS 303 AND 516 OF THE TARIFF ACT OF 1930.

(a) Section 303 of the Tariff Act of 1930 (19 U.S.C. sec. 1303) is amended to read as follows:

"SEC. 303. COUNTERVAILING DUTIES.

"(a) *Levy of Countervailing Duties.*—

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon

the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall determine within twelve months after the date on which the question is presented to him whether any bounty or grant is being paid or bestowed.

"(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Tariff Commission under subsection (b)(1); except that such a Tariff Commission determination shall be required only for such time as a determination of injury is required by the international obligations of the United States.

"(3) The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

"(4) Whenever, in the case of any imported article or merchandise as to which the Secretary has not determined whether a bounty or grant is being paid or bestowed, the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation into the question of whether a bounty or grant is being paid or bestowed is warranted, he shall forthwith publish notice of the initiation of such an investigation in the Federal Register.

The date of publication of such notice shall be considered the date on which the question is presented to the Secretary within the meaning of subsection (a)(1).

"(5) The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of the duties under this section. All determinations by the Secretary under this section, and all determinations by the Tariff Commission under subsection (b)(1) (whether affirmative or negative), shall be published in the Federal Register.

"(b) *Injury Determinations With Respect to Duty-Free Merchandise; Suspension of Liquidation.*—

(1) Whenever the Secretary of the Treasury has determined under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty, he shall—

"(A) so advise the United States Tariff Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

"(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption, on or after the thirtieth day after the date of the publication in the Federal Register of his determination under subsection (a)(1), and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public

an order as provided for in paragraph (3) of this subsection.

"(2) For the purposes of this subsection, the Tariff Commission shall be deemed to have made an affirmative determination if the Commissioners of such Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

"(3) If the determination of the Tariff Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a).

"(c) *Application of Affirmative Determination.*—

An affirmative determination by the Secretary of the Treasury under subsection (a)(1) with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the thirtieth day after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Tariff Commission make an affirmative determination of injury under subsection (b)(1).

"(d) *Articles Subject to Quantitative Limitations.*—

Whenever the Secretary determines, after seeking information and advice from such agencies as he may deem appropriate, that any article is subject to a quantitative limitation imposed by the United States on its importation into, or subject to an effective quantitative limitation on its exportation to, the United States and that such quantitative limitation is an adequate substitute for the imposition of a duty under this section, the imposition of an additional duty under this section shall not be required.

"(e) *Temporary Provision While Negotiations Are in Process.*—If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary determines, at any time before the day which is four years after the date of the enactment of this subsection, that the imposition of an additional duty under this section with respect to any article would be likely to seriously jeopardize the satisfactory completion of the negotiations contemplated by sections 101 and 102 of the Trade Reform Act of 1973, the imposition of such additional duty under this section with respect to such article shall not be required. In the case of a question presented on or after the day which is one year after the date of the enactment of this Act, this subsection shall not apply with respect to any article which is the product of facilities owned or controlled by a developed country if the investment in, or the operation of, such facilities, is subsidized."

(b) Section 516 of the Tariff Act of 1930 (19 U.S.C. sec. 1516) is amended to read as follows:

"SEC. 516. PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS.

"(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, and the additional duty described in section 303 of this Act (hereinafter in this section referred to as 'countervailing duties'), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he be-

lieves proper, and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties should be assessed.

"(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, and shall notify the petitioner of his determination. Except for countervailing duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 303 shall apply.

"(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) is correct, or that countervailing duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with

such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated."

(c)(1) Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The last sentence of section 303(a)(1) of the Tariff Act of 1930 (as added by subsection (a) of this section) shall apply only with respect to questions presented on or after the date of the enactment of this Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).

FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-539

In the Supreme Court of the United States

OCTOBER TERM, 1977

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Deputy Solicitor General,
RICHARD A. ALLEN,
Assistant to the Solicitor General,
LEONARD SCHAITMAN,
DAVID M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT H. MUNDHEIM,
General Counsel,
Department of the Treasury,
Washington, D.C. 20220.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	6
Argument:	
The failure of Japan to collect a tax on exported articles is not a bounty or grant	9
A. The noncollection of an indirect tax is neutral with respect to exports	9
B. The legislative history of Section 303 demonstrates that Congress did not intend the statute to apply to the nonexcessive remission of indirect taxes	19
C. The Secretary's consistent interpretation and application of Section 303 for 80 years has been ratified by Congress' repeated reenactment of Section 303 with knowledge of the Secretary's interpretation	24
1. The administrative practice is longstanding and consistent and Congress has ratified it	24

259-855—78——1

Argument—Continued
2. International trading relationships have been built on the consistent administrative interpretation of the statute — Page 28
D. The administrative interpretation of the statute is consistent with the decisions of this court — 30
E. There is no need for a factual hearing — 35
Conclusion — 39

CITATIONS

Cases:

Barrett v. *United States*, 423 U.S. 212 — 53
Downs v. *United States*, 187 U.S. 496 — 5, 8, 30, 32
G. S. Nicholas & Co. v. *United States*, 249 U.S. 34 — 34
Helvering v. *Winmill*, 305 U.S. 79 — 26
Lorillard v. *Pons*, No. 76–1346, decided February 22, 1978 — 26
Mourning v. *Family Publications Inc.*, 411 U.S. 356 — 37, 38
National Bellas Hess, Inc., v. *Illinois Revenue Department*, 386 U.S. 753 — 13
National Geographic Society v. *California Board of Equalization*, 430 U.S. 551 — 13
National Labor Relations Board v. *Enterprise Association*, 429 U.S. 507 — 26
Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359 — 13
Power Reactor Development Co. v. *International Union of Electrical Workers*, 367 U.S. 396 — 25

Cases—Continued

Page
Saxbe v. *Bustos*, 419 U.S. 65 — 25
Train v. *Natural Resources Defense Council*, 421 U.S. 60 — 38
Udall v. *Tallman*, 380 U.S. 1 — 25
United States v. *Hills Bros. Co.*, 107 Fed. 107 — 34
United States v. *Passavant*, 169 U.S. 16 — 35

Statutes and regulation:

Act of October 1, 1890, Paragraph 237, 26 Stat. 567, 584 — 20
Act of August 7, 1894, Paragraph 182½, 28 Stat. 509, 521 — 21
Anti-Dumping Act of 1921, 42 Stat. 12, 19 U.S.C. 162 — 27
General Agreement on Tariffs and Trade, 61 Stat. A3 *et seq:*
Article VI(4), 61 Stat. A24 — 19
Article XXIII, 61 Stat. A64–A65 — 29
Tariff Act of July 24, 1897, Section 5, 30 Stat. 205 — 22
Tariff Act of 1909, 36 Stat. 85 — 24
Tariff Act of 1913, 38 Stat. 192 — 24
Tariff Act of 1922, 42 Stat. 935 — 24, 33
Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. (and Supp. V) 1303 *et seq:*
Section 303, 19 U.S.C. (and Supp. V) 1303 — 3, 5, 9, 19, 24, 26, 27
Section 303(a)(1), 19 U.S.C. (Supp. V) 1303(a)(1) — 2
Section 402, as added, 70 Stat. 943, 19 U.S.C. 1401a(d) — 35
Section 516(a), 19 U.S.C. 1516(a) — 3

Statutes and regulations—Continued
Section 516(d), 19 U.S.C. (Supp. V) 1516(d) ---- 3
Trade Act of 1974, 88 Stat. 1978, 2049 ---- 24, 25
19 U.S.C. (Supp. V) 2102 ---- 19
1 Stat. 26 ---- 19
1 Stat. 199 ---- 19
30 Stat. 205 ---- 10
26 U.S.C. 5062, 5706 ---- 19
19 C.F.R. 159.47(a) ---- 3
Miscellaneous:
An Outline of Japanese Taxes (1975) ---- 4
Barzel, *An Alternative Approach to the Analysis of Taxation*, 84 J. Pol. Econ. 1177 (1976) ---- 17
21 Cong. Rec. 9529–9536 (1890) ---- 20
21 Cong. Rec. 9537 (1890) ---- 20
26 Cong. Rec. 784 (1894) ---- 23
26 Cong. Rec. 5705 (1894) ---- 22
26 Cong. Rec. 5705–5706 (1894) ---- 22
26 Cong. Rec. 5706 (1894) ---- 23
30 Cong. Rec. (1897):
p. 1634 ---- 23
p. 1635 ---- 23
p. 1646 ---- 23
p. 1650 ---- 23
p. 1658 ---- 23
p. 1674 ---- 23
p. 1680 ---- 23
p. 1694 ---- 23
p. 1719 ---- 23
pp. 1721–1722 ---- 23
p. 1729 ---- 23
p. 2203 ---- 23
p. 2213 ---- 23

Miscellaneous—Continued
Page
p. 2223 ---- 23
p. 2224 ---- 23
61 Cong. Rec. 4132 (1921) ---- 33
126 Consol. Treaty Series 178 ---- 19
European Historical Statistics, 1750–1970, B. R. Mitchell, Columbia University Press, N.Y. 1976 ---- 29
Harberger, *The Incidence of the Corporation Income Tax*, 70 J. Pol. Econ. 215 (1962) ---- 17
Hearings on H.R. 5505 before the Senate Committee on Finance, 82d Cong., 2d Sess. (1952) ---- 27
Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess. (1973) ---- 25
Hearings on the Extension of Reciprocal Trade Agreements Act before the Senate Committee on Finance, 81st Cong., 1st Sess. (1949) ---- 24
Hearings on World Trade and Investment Issues before the Subcommittee on International Trade of the Senate Committee on Finance, 92d Cong., 1st Sess. (1971) ---- 25
Historical Statistics of Canada, Ed. M. C. Urquhart, MacMillian Co. of Canada Ltd., 1965 ---- 29
Historical statistics of the United States, Colonial Times to 1970, Department of Commerce, Bureau of Census ---- 29
Hundred Year Statistics of the Japanese Economy, Statistics Department, Bank of Japan, July 1966 ---- 29

Miscellaneous—Continued

	Page
McLure & Thirsk, *'A Simplified Explanation of the Harberger Model—I: Tax Incidence*, 28 National Tax. J. 1 (1975)	17
Revenue Statistics of OECD Member Countries, 1965–1974, OECD 1976	29
4 Ricardo, *Works and Correspondence* (Straffa ed. 1961)	17
Senate Committee on Finance, *Executive Branch GATT Studies*, 93d Cong., 2d Sess. (1974)	17–18
Smith, *'An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book IV ch. IV (1776)	17
2 Treas. Dec. 996	31
4 Treas. Dec. 184	31
T.D. 19321, 1 Synopsis of Decisions 696	10
T.D. 19729, 2 Synopsis of Decisions 157	10
T.D. 20039, G.A. 4261, 2 Synopsis of Decisions 534	10
T.D. 42895, 54 Treas. Dec. 101	10
T.D. 43634, 56 Treas. Dec. 342	10
T.D. 49355, 73 Treas. Dec. 107	10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 57a–112a) is reported at 562 F. 2d 1209. The opinion of the Customs Court (Pet. App. 1a–50a) is reported at 430 F. Supp. 242. The decision of the Commissioner of Customs (A. 24–25) is reported at 41 Fed. Reg. 1298.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. The petition for a writ of certiorari was filed on October 11, 1977,

and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the remission of the Japanese Commodity Tax, which is imposed on certain consumer electronic products only if they are sold in Japan, is a bounty or grant within the meaning of Section 303 of the Tariff Act of 1930.

STATUTE INVOLVED

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. (Supp. V) 1303 (a)(1), provides:

> Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

STATEMENT

In April 1970 petitioner, a domestic manufacturer of consumer electronic products, filed a petition (A. 139–150) with the Commissioner of Customs, requesting the Commissioner to assess countervailing duties, under Section 303 of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303, on various consumer electronic products exported from Japan.[1] Petitioner contended that the products benefited from bounties or grants paid or confered by the Government of Japan, because, *inter alia,* Japan imposes a tax on those products when they are sold in Japan but does not impose the tax when the products are exported.

The Japaneses Commodity Tax is an *ad valorem* tax (*i.e.*, a tax levied with respect to identified goods and calculated as a percentage of the value or sales price of the goods). It is imposed on certain consumer prod-

[1] In 1970 Congress provided a mechanism that enables interested persons to require the Secretary of the Treasury to determine whether countervailing duties should be imposed on imported articles. 19 U.S.C. 1516(a). Treasury regulations require the filing of petitions under the statute with the Commissioner of Customs. 19 C. F.R. 159.47(a).

A decision to impose countervailing duties always has been open to judicial review; in 1974 Congress made available judicial review of a decision not to impose countervailing duties. See 88 Stat. 2048, 19 U.S.C. (Supp. V) 1516(d). To take advantage of this provision, within 30 days of the publication of a determination not to impose duties, "such manufacturer * * * may commence an action in the United States Customs Court contesting such determination."

259-055—78——2

ucts shipped in Japan.[2] The tax operates as a consumption tax and applies to goods regardless of their place of origin. If the products are manufactured in Japan, the tax is imposed when they are shipped from the factory; if they are imported into Japan, the tax is imposed when the products are withdrawn from the customs warehouse. The tax is not imposed on products made in Japan that are shipped from the factory for export.[3] In other words, the tax is remitted with respect to exports. ("Remission" of taxes, as used by the parties in this litigation, means either the failure to collect the Commodity Tax on exported articles or the refund to the exporter of taxes that have been collected. "Nonexcessive" remission means remission that does not exceed the amount of tax imposed.)

In January 1976 the Commissioner of Customs published a notice of final determination with respect to petitioner's petition (A. 24–25). The notice stated in relevant part that: "on the basis of the additional facts gathered and the investigation conducted pursuant to * * * Customs Regulations * * * a final determination * * * is hereby made * * * that * * * no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303

[2] Portions of the Japanese Commodity Tax statute are set forth at A. 44–48. The operation of the tax is not disputed here. Compare A. 14 with A. 30–31.

[3] If the tax is paid on the shipment of an article that is later exported, the tax is repaid to the exporter. A. 14; see also *An Outline of Japanese Taxes* 134 (1975) (prepared under the authority of the Tax Bureau of the Japanese Ministery of Finance).

* * * upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan" (A. 25).

Petitioner then filed this suit in the Customs Court seeking review of the determination with respect to the remission of the Japanese Commodity Tax as it applied to certain Japanese consumer electronic products specified in the complaint (A. 8–29).[4]

The Customs Court granted petitioner's motion for summary judgment and denied our cross-motion (Pet. App. 1a–50a). Relying mainly on *Downs* v. *United States,* 187 U.S. 496, the court held that, as a matter of law, the remission of the Japanese Commodity Tax is a bounty or grant (Pet. App. 5a) and ordered the Secretary of the Treasury to determine the net amount of the bounty or grant and to impose a countervailing duty equivalent to that amount on all Japanese consumer electronic products specified in the complaint (Pet. App. 53a).

The Court of Customs and Patent Appeals reversed and remanded with directions to enter summary judgment for the United States. The court held, first, that *Downs* is not controlling because it did not involve the issue presented here—*i.e.,* whether the nonexcessive remission of a tax levied on a product, standing alone, is a bounty or grant within the scope of Section 303 (Pet. App. 66a). The court explained that *Downs*

[4] Petitioner's 1970 petition had alleged that a number of other Japanese practices also are bounties or grants under Section 303. Petitioner's complaint in the Customs Court did not challenge the negative determination with respect to those practices, and they are not at issue in this case.

involved a complex Russian scheme for the regulation of sugar that provided for both the remission of excise taxes when the product was exported *and* the issuance of valuable certificates to the exporter; the amount of the countervailing duty assessed was equal to the value of the certificates. As the court stated, the bounty "was found to reside in, and was measured by, an excess of the remission of excise taxes" (Pet. App. 67a n. 12).

The court held that nothing in the legislative history of the countervailing duty statute indicates Congress' intent to require the imposition of countervailing duties on the nonexcessive remission of the kind of taxes involved in this case (Pet. App. 70a); that the Secretary's interpretation of the statute had been adhered to since its first enactment (*id.* at 74a); and that many congressional actions since the interpretation was adopted demonstrated that Congress has ratified the Secretary's interpretation (*id.* at 76a–82a).

Two judges dissented on the ground that the case is controlled by previous decisions of this Court, particularly *Downs* (Pet. App. 84a–112a).

SUMMARY OF ARGUMENT

A. The countervailing duty statute is designed to cancel the competitive advantage that a foreign producer achieves when the foreign nation subsidizes exports. The noncollection on exports of a tax levied on domestic consumption does not subsidize exports; it is essentially neutral. The Secretary of the Treas-

ury therefore has taken the position for 80 years that the remission of an indirect tax (*i.e.*, a tax levied on the goods themselves and measured by their price or cost rather than by the income or wealth of the purchaser or seller) is not a "bounty or grant" on exports.

Petitioner argues that the bounty on export lies in the difference between the domestic (taxed) price in Japan and the untaxed export price. But a moment's reflection shows that there is a fundamental difference between the failure to tax a good and the provision of a subsidy; in the former case, the foreign goods can compete with United States goods on an equal footing, whereas in the latter the foreign goods obtain a competitive advantage. The countervailing duty statute is intended to offset the advantage conferred by a subsidy, not to require the United States to collect the same sort of tax that Japan desires to impose on goods consumed there.

Indeed, the imposition of countervailing duties in circumstances like those of this case would lead to double taxation: the foreign goods would be priced at their cost of manufacture, plus the countervailing duty, plus the sales tax of the state where they were sold, while domestic goods would be priced at their cost of manufacture plus only the sales tax. That would put foreign goods at a disadvantage in addition to the disadvantage already imposed by tariffs and transportation costs. That is not the purpose of the countervailing duty statute.

B. The legislative history of the countervailing duty statute, which petitioner does not mention, demonstrates that Congress understood that a "bounty or grant" would not include the exporting country's remission of indirect taxes, but would encompass only payments in excess of such remissions.

C. The Secretary has consistently interpreted and applied the countervailing duty statute as not applying to remissions of indirect taxes. Congress, with knowledge of that interpretation, has reenacted the statute five times without changing the relevant language. As a result of the administrative practice and the congressional reenactments of the statute, the Secretary's position has become an essential premise on which international trade is conducted. A change in the rule would disrupt trading and cause economic dislocations; it would undoubtedly lead to retaliation against American exports. Those facts, which petitioner does not deny, provide significant additional support for the Secretary's interpretation.

D. *Downs* v. *United States,* 187 U.S. 496, on which petitioner relies almost exclusively, is not inconsistent with the Secretary's interpretation and does not control this case. Neither *Downs* nor any other case dealt with the question whether a countervailing duty should be applied on the nonexcessive remission of indirect taxes. Indeed, consistently with the Secretary's practice, a countervailing duty was not imposed on the nonexcessive remission of indirect taxes on the products involved in *Downs,* and the Court's opinion

strongly suggests an endorsement of the Secretary's practice.

E. The court below correctly directed that summary judgment be entered for the United States. As petitioner admits, the issue is one of law, and the factual underpinnings of the Secretary's interpretation of the statute were never challenged by petitioner in this case. In any event, the issue does not turn on a factual determination of the exact economic consequences of a remission of indirect taxes in each particular case, and it would be difficult to administer the statute if such a determination were required. The open question is whether the classification that the Secretary has adopted to implement the statute is reasonable in light of the legislative purpose and understanding. The considerations on which that classification is based demonstrate that it is reasonable and consistent with the statute.

ARGUMENT

THE FAILURE OF JAPAN TO COLLECT A TAX ON EXPORTED ARTICLES IS NOT A BOUNTY OR GRANT

A. THE NONCOLLECTION OF AN INDIRECT TAX IS NEUTRAL WITH RESPECT TO EXPORTS

Section 303 of the Tariff Act provides that the United States shall impose countervailing duties to offset any "bounty or grant" given by an exporting nation with respect to any export. The statute was intended, as the parties agree, to counteract subsidies of exports. An express subsidy is the clearest example. If the cost of producing corn in Europe were $1.00 per bushel, and Germany paid farmers $.10 for every

bushel exported, that would be a bounty or grant. If corn cost $.95 to produce in the United States, the bounty would allow German farmers to sell their corn at a profit in the United States, while corn grown here, although cheaper to produce, would cost more to sell. The countervailing duty of $.10 would restore the market to its original condition by cancelling the advantage of the bounty on exports.

Since the countervailing duty law was first enacted in its present form in 1897, 30 Stat. 205, the Department of the Treasury has unswervingly taken the position that only a subsidy of some sort is a bounty or grant, and that a nation's decision not to collect an excise tax on exports is not a subsidy of exports, even though an excise or indirect tax may be collected with respect to goods consumed in that nation.[8]

Some illustrations may make clear both the Secretary's position and the reasons why the noncollection of a commodity tax is not a grant or bounty.

Suppose that a nation levies no tax at all on commodities. A manufacturer then can export the commodities without tax, and his cost is unaffected by governmental action. No one would say that the failure of a nation to impose an excise or commodity tax—usually called an indirect tax because it pertains

[8] The Department's interpretation was announced on May 6, 1898, less than one year after the statute was enacted. See T.D. 19321, 1 Synopsis of Decisions 696 (1898). Petitioner does not dispute that the interpretation is consistent and of longstanding. For illustrative decisions, see T.D. 19729, 2 Synopsis of Decisions 157, 157–158 (1898); T.D. 20039, G.A. 4261, 2 Synopsis of Decisions 534, 535–536 (1898); T.D. 49355, 73 Treas. Dec. 107 (1938). See T.D. 42895, 54 Treas. Dec. 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929).

to and is measured by the value of the goods rather than by the income or wealth of their owner, purchaser or producer—is a bounty or grant on exports.

A Japanese manufacturer is in much the same position as a manufacturer in the nation with no taxes. He may export goods at their cost, which is neither increased nor decreased by governmental action. He is in the same position vis-a-vis United States producers as if there were no taxes. There is no grant or bounty on export; there is simply neutrality.

Petitioner contends, however, that the bounty lies not in any subsidy as that term is usually understood, but in the difference between the treatment of goods intended for the domestic market and goods intended for export. Goods consumed in Japan are taxed by Japan; goods exported are not. According to petitioner, that difference is an incentive to export and amounts to a bounty or grant.

There is a fundamental difference, however, between a subsidy and the remission of an indirect tax. Assume that there are three countries, *A*, *B*, and *C*. In each country, corn can be grown for $1.00 per bushel. Assume further that corn can be shipped at slight cost. Country *A* has no tax on corn. Country *B* places a domestic consumption tax of $.10 on corn. The tax is remitted on exported corn. Country *C* has no tax on corn, but exporters receive $.10 for every bushel exported. In either *B* or *C*, the price of exported corn is $.10 less than the price of corn consumed at home. Petitioner would argue that both *B* and *C* give a

259-055—78——3

"bounty" to exported corn, measured by the difference between the domestic price and the export price.

A moment's reflection shows, however, that the schemes of *B* and *C* are quite dissimilar. At break-even prices, corn from *C* can sell in country *A* for only $.90 per bushel, whereas corn from *B* can sell in country *A* for $1.00. *B*'s remission of its consumption tax on the exported corn makes the farmers of *A* no worse off than they would be if *B* had no taxes. The program of country *C*, however, produces disaster for the farmers of *A*, because the grain from *C* corners the market. The difference between neutrality toward exports (as in *B*) and a subsidy of exports (as in *C*) shows up most vividly in *A*.[8]

[8] The following table reflects the selling price of corn in the hypothetical situation we have set out:

	Selling price at destination		
	A	*B*	*C*
Country of origin:			
A	$1.00	$1.10	$1.00
B	1.00	1.10	1.00
C	0.90	1.00	1.00

All sellers are on an equal footing in *C*, but corn from *C* has an advantage in both *A* and *B*. To equalize the situation, countries *A* and *B* would impose countervailing duties of 10 cents on corn from *C*. But if country *A* imposed a countervailing duty of 10 cents on corn from *B*, that corn would be subjected to a disadvantage on sales in *A*. In fact, if *A* imposed a countervailing duty on corn from both *B* and *C*, corn from *C* would continue to enjoy an advantage vis-a-vis corn from *B*.

The hypothetical German corn program discussed above is like the program of country *C*. The remission of the Japanese Commodity Tax is like the program of country *B*. And the effect on producers in the United States (country *A*) is very different. Even though, as petitioner points out, there is a 10 cent differential between the export price and the domestic price in both *B* and *C*, one is a bounty and the other is not.

The difficulty with petitioner's argument is further illustrated by the application of the sales tax. For example, suppose that both New York and California impose sales taxes of five percent on television sets. A set manufactured in New York and sold in New York is subject to a five percent tax; if it is "exported" (shipped to California) it is not taxed by New York, because it never reaches the point of sale. Is this remission a "bounty" or "grant" by New York that subsidizes exports? No, it is nothing more than a decision of the state to leave commerce alone. Indeed, under the Constitution a state could not collect a tax on exports, because, as this Court has held, such a tax would burden interstate commerce.[9] Non-imposition of the tax is necessary in order to achieve neutrality.

Once the New York television set reaches California, it is subject to California's sales tax. Sets manufactured in California and sold in that state also are taxed by California, and this puts New York and

[9] Compare *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, with *National Bellas Hess, Inc.* v. *Illinois Revenue Department*, 386 U.S. 753, and *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 363.

California manufacturers on an equal footing. Manufacturers in either State are taxed only once, in an equal amount, at the rate prevailing in the state of sale.

If New York were to collect a tax on sets manufactured there and shipped to California, the same set (assumed to cost $100 without tax) would be taxed twice: (1) a set manufactured in New York and sold in New York would cost $105 ($100 plus the five percent New York sales tax); (2) a set manufactured in California and sold in California would cost $105 ($100 plus the five percent California sales tax); but (3) a set manufactured in New York and sold in California would cost $110 ($100 plus a five percent New York tax plus the five percent California tax). This would place New York sets at a disadvantage and burden commerce.[8]

Moreover, if California were to conclude that New York's *failure* to collect its five percent sales tax on

[8] The illustrations in this brief assume that all manufacturers' costs are the same. The argument would not be affected if New York manufacturers' costs were lower than those of California manufacturers. In that event, New York manufacturers would enjoy a competitive advantage, but it is only appropriate that the lowest-cost seller have the advantage, because that seller uses less of society's resources to make the product, and cost savings should be rewarded with sales. In international trade, when a political decision is made to cancel the advantage of a low-cost producer, that is done through tariffs. The countervailing duty is not designed to place low-cost producers at any disadvantage, however; its role is to ensure that price fairly reflects cost and to cancel artificial advantages conferred by export or production subsidies. Because the countervailing duty is unrelated to cost differences, we have assumed equal cost in the examples for purposes of simplicity.

sets sent to California were a "bounty" (because sets sold in New York would cost $105 but sets could be shipped out at a cost of $100), and if California then were to collect a "countervailing" tax, there would again be double taxation. New York sets sold in California would cost $110 ($100 plus the five percent "countervailing" tax at the time of entry into California plus the five percent California tax at the point of sale). The imposition of a countervailing California tax thus would produce, not neutrality, but a decided advantage for California manufacturers.

The situation is the same if the states have unequal taxes. New Hampshire has no sales tax. A television set manufactured in New York and sold in New Hampshire costs only $100, because it is not taxed; the same set sold in New York would cost $105 ($100 plus the five percent sales tax). Manufacturers of the two states still are on an equal footing: New Hampshire manufacturers can sell a set for $100 in New Hampshire or $105 in New York, the same price at which New York manufacturers can sell. But if New Hampshire were to declare that the failure of New York to collect its tax on exported sets is a "bounty" and to impose a countervailing tax, then New York manufacturers would face a disadvantage. New York-made sets would sell for $105 in New Hampshire, while New Hampshire-made sets would sell for $100 there.

The same thing would happen if California had a 20 percent tax rather than a five percent tax. If New York were to impose a "countervailing" tax on

California-made sets because California does not tax exports, a California-made set would sell in New York for $125 ($100 plus $20 countervailing tax plus five percent sales tax), while sets made in New York would sell for only $105 in New York. Levying a sales or consumption tax on exported sets, or a countervailing tax, thus creates a hornet's nest of inequalities.

The Japanese Commodity Tax acts just like a sales tax. It is a tax imposed on the goods themselves and could be collected either at the point of sale (as a sales tax is collected) or as the goods leave the manufacturer. Japan chooses to impose the tax as the goods leave the place of manufacture, evidently to facilitate collection. But the point at which a tax is levied has no economic consequence, and so, if the failure to collect a sales tax on goods that are not sold within the jurisdiction is not a bounty or grant, the failure to collect the Japanese Commodity Tax on goods not sold in Japan is not a bounty or grant. The similarity of the Japanese Commodity Tax to a sales tax is made more evident by the fact that the tax is collected on imports; that is, it is collected on all goods (or a particular type) sold in Japan, regardless of where the goods were made. It is an absolutely neutral tax. Japan collects its commodity tax on all goods sold there; the states collect their sales taxes on all goods sold here. Although the Japanese commodity tax is higher than the sales taxes of most states, it acts in principle the same as the difference between New York and California taxes in the example immediately above.

All indirect taxes imposed by a state or nation with respect to particular goods are governed by this principle. Accordingly, the failure of any state or nation to collect an indirect tax on exported goods is not a bounty or grant. It is simple neutrality, the avoidance of double taxation.[9] On sales in the United States, both Japanese goods and American goods are exposed to the sales tax of the states but not to the Commodity Tax. On sales in Japan, both Japanese goods and American goods are exposed to the Commodity Tax. The manufacturers are on an equal footing in either country. The remission of an indirect tax will rarely be offset exactly by the domestic tax imposed by the importing nation, but equivalence is unnecessary. Whether or not the taxes are the same, the manufacturers in both states or countries are on an equal footing in competing for sales in both states or countries.

The bright-line test adopted by the Secretary is correct as a matter of principle and essential as a rule of administration. It is difficult if not impossible to determine the real incidence of taxes,[10] and so the

---

[9] This proposition, like the Secretary's interpretation, is of long standing. See Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book IV, ch. IV (1776); 4 Ricardo, *Works and Correspondence* 216 (Straffa ed. 1961).

[10] See Harberger, *The Incidence of the Corporation Income Tax*, 70 J. Pol. Econ. 215 (1962); McLure and Thirsk, *A Simplified Explanation of the Harberger Model—I: Tax Incidence*, 28 National Tax J. 1 (1975); Barzel, *An Alternative Approach to the Analysis of Taxation*, 84 J. Pol. Econ. 1177 (1976). See also Senate Committee on Finance, *Executive Branch GATT Studies*,

rule applied by the Secretary has been adopted by every major trading nation of the world in order to

93d Cong., 2d Sess. 11–12 (1974) (quoted at Pet. App. 74a n. 19). In the case of indirect taxes, all of the tax should be born by the consumer if the manufacturing and selling industries are perfectly competitive and if all of the factors of production are being employed at marginal cost. Ordinarily there is a presumption that the factors of production are so employed; otherwise some other industry would bid them away and put them to better use. An indirect tax imposed in these circumstances cannot lead the manufacturer to reduce his own costs or bear any part of the tax; it is "shifted forward" to the consumer, and the resulting decline in sales (because of the higher price) leads to lower production. But if the factors of production are uniquely suited to a particular industry, or if the tax is less than the amount by which the factors are more profitably employed in the industry than anywhere else, then the factors could not profitably be shifted elsewhere when higher prices led to lower sales. The manufacturer employing such factors of production would absorb some of the tax in order to avoid increased prices and reduced sales. (In economic language, the tax would fall on the economic rents the manufacturer enjoys from the specialized factors of production.) An indirect tax of ten percent might lead to no increase in price at all if all factors of production were specialized and the economic rent exceeded the value of the tax.

It is difficult to determine the extent to which factors of production are so specialized that they yield economic rents; the problem is unsolved by modern economists, although they suspect that economic rents are rare, and that indirect taxes thus usually are born by consumers. But regardless of the incidence of taxes that are levied, the fact remains that the non-levy of a tax is essentially neutral.

The difficulty in determining incidence is compounded in the case of direct taxes (levied on a person or corporation with respect to income or wealth) by the difficulty of apportionment. If part of a direct tax is remitted, it is almost impossible to ascertain to what extent the remission is attributable to exports and whether it is "excessive" (what is, whether the remission lifts more than the tax initially imposed). Because of these problems, the Secretary traditionally has viewed remission of direct taxes as a bounty or grant on export.

facilitate the free flow of international trade.[11] Expectations have been created, and entire economic systems built, on the assumption that this is the proper treatment of indirect taxes. As we now show, the Secretary's position carries out the intent of Congress.

B. THE LEGISLATIVE HISTORY OF SECTION 303 DEMONSTRATES THAT CONGRESS DID NOT INTEND THE STATUTE TO APPLY TO THE NONEXCESSIVE REMISSION OF INDIRECT TAXES

The court below concluded (Pet. App. 70a) that nothing in the legislative history of the countervailing duty statute "indicates a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us." While that conclusion is correct as far as it goes, we submit that the legislative his-

[11] The remission of indirect taxes—and the failure to impose any countervailing duty—has been accepted international practice since the 18th century (see, *e.g.*, 126 Consol. Treaty Series 178, 181) and has been a feature of our own excise tax laws since 1789. See 1 Stat. 26 (1789); 1 Stat. 199 (1791); 26 U.S.C. 5062, 5706. The practice has been adopted in the General Agreement on Tariffs and Trades, to which every major trading country adheres. Article VI(4) of the GATT, 61 Stat. A24, provides that "no product * * * imported into the territory of any other contracting party shall be subject to * * * countervailing duty by reason of the exemption of such product from * * * taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such * * * taxes." The Japanese Commodity Tax is a consumption tax.

We do not content that GATT provisions, which are trade agreements entered into by the President under general statutory authority (see 19 U.S.C. (Supp. V) 2102), would supersede statutes like Section 303 in the event of conflict. The adherence of the United States to GATT, including Article VI(4), however, is significant. See pages 28–30, *infra*.

tory—to which petitioner does not refer—affirmatively establishes that Congress intended that countervailing duties were not to be imposed with respect to such remissions.

Congress' intent is reflected in the evolution of the statutory language and in the explanations of the legislation set forth in the congressional debates. The statutory obligation to impose countervailing duties first appeared in a provision of the sugar tariff of 1890 (Paragraph 237 of the Act of October 1, 1890, 26 Stat. 567, 584; Br. in Opp. App. 1A) that was enacted in response to practices of European governments seeking to encourage sugar exports. The countervailing duty provision stated that all imported sugars above a certain grade:

> shall pay one-tenth of one cent per pound in addition to the rate herein provided for, when exported from, or the product of any country when and so long as such country pays or shall hereafter pay, directly or indirectly, a bounty on the exportation of [certain grades of] sugar * * *.

The record of the debate on the 1890 sugar tariff clearly demonstrates that what Congress understood by "bounty" was remissions (or "drawbacks") of indirect taxes *exceeding* the taxes the exporters had paid on the articles. Senator Gibson, who criticized the European practices at length (see 21 Cong. Rec. 9529–9536 (1890)), appended to his remarks a description of "The Bounty Systems In Europe" (21 Cong. Rec. 9537 (1890)), which noted, for example,

that French sugar manufacturers paid a single excise tax of $97.06 per gross ton, "[b]ut upon the export of a ton of sugar he received back as a drawback $117.60, making a clear bounty of $20.54 per gross ton of sugar exported." The "bounties" paid by Germany, Austria and other European governments were similarly described (*ibid.*).[12] Congress thus saw as a "bounty" only the remission or drawback of taxes that exceeded the taxes paid; the remission of the taxes actually paid was not considered a bounty on exportation that would be subject to additional duty.

In 1894 the countervailing duty provision was reenacted in largely the same form, but Congress added the following proviso, presumably to incorporate expressly the earlier understanding:[13]

> *Provided,* That the importer of sugar produced in a foreign country, the Government of which grants such direct or indirect bounties, may be relieved from this additional duty * * * in case said importer produces a certificate of said Government that no indirect bounty has been received upon said sugar *in excess of the*

[12] The description of the German system noted that Germany imposed two excise taxes on sugar, a "consumption" tax and a "material" tax. The discussion of the "bounty" focused only on the remission of the "material" tax, and, as in the case of France, defined the bounty in terms of the excess of the remission over the tax paid. It is also significant that, although Senator Gibson's description noted that Germany did not collect "consumption" taxes on sugar that was exported, it did not regard that failure as a bounty.

[13] Paragraph 182½ of the Act of August 27, 1894, 28 Stat. 509, 521.

tax collected upon the beet or cane from which it was produced * * *. [Emphasis supplied.]

Again the debates confirm that Congress understood the term "bounties" to apply only to the excessive remission of excise taxes. 26 Cong. Rec. 5705–5706 (1894).

In 1897 the statute was revised and made applicable to all imported products (Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205). The proviso in the 1894 statute was deleted, and the statute modified to provide, as Section 303 provides today, that "there shall be levied and paid * * * an additional duty equal to the *net* amount of such bounty or grant * * *" (*ibid.*; emphasis supplied).

The floor debates on the 1894 and 1897 statutes demonstrate that the phrase "net amount of such bounty or grant" added by the 1897 statute was meant to incorporate the principle, expressly set forth in the 1894 proviso, that only excessive remissions of indirect taxes trigger the obligation to impose a countervailing duty.

In the Senate debate on the 1894 proviso, Senator Jones, author of that provision, gave as an illustration the case of Germany, which he understood to pay exporters 21½ cents per hundred pounds of sugar exported but imposed an internal tax of about 15 cents per hundred pounds, so that "there is a net bounty on the exportation of refined sugar of six and a half one-hundredths of a cent [per pound]." 26 Cong. Rec. 5705 (1894). In the debate on the 1897 statute, Senator Allison, sponsor of that provision,

advised Senator Jones that "this countervailing duty is only an imitation and an emulation of [your] own committee in 1894 * * *" (30 Cong. Rec. 1719 (1897)) and later stated that his proposal was concerned only with "the net bounty, less the taxes and reductions which I have named" (*id.* at 1721). The same understanding is reflected throughout the debates.[14] Indeed, if that were not Congress' understanding, the addition of the phrase "net amount of such bounty or grant" would have little meaning.

In sum, the legislative history of each version of the statute reflects the consistent understanding of

---

[14] Like the debates on the 1894 version of the statute, the 1897 debate focused on German sugar exports, and, as earlier, the figures cited for the "bounties" paid by Germany did not include an amount to account for the fact that Germany remitted or did not collect its internal tax on exported sugar (see 30 Cong. Rec. 1650, 1658, 1674, 1680, 1694, 1719, 1729, 1721–1722 (1897)), although Congress was aware of the fact (26 Cong. Rec. 784 (1894) (Senator Quay)); 26 Cong. Rec. 5706 (1894) (Senator Jones); 30 Cong. Rec. 1646 (1897) (Senator Vest)).

The version of the 1897 statute that originally passed the House expressly included a proviso that the bounty was to be measured by the excess of the remission over the excise tax paid. See 30 Cong. Rec. 1634 (1897). Although the Senate Committee on Finance proposed the more general language that now appears in the statute (30 Cong. Rec. 1635 (1897)), the reasons for that proposal are not clear. The Senate's debates on the more general version suggest that it was to accommodate certain German protests to the House version (see 30 Cong. Rec. 2203, 2213, 2223, 2224 (1897)), rather than to alter the general understanding that bounties consisted only of excessive remissions. (It is hardly likely that the Senate would have responded to German protests by altering the statute so as to treble the size of the countervailing duty on German sugar. At a minimum, if that were the Senate's purpose, someone would have said so.)

Congress that the grants or bounties intended to be subject to countervailing duties consist only of payments in excess of taxes collected and do not include the failure to collect taxes or the nonexcessive remission of taxes.

C. THE SECRETARY'S CONSISTENT INTERPRETATION AND APPLICATION OF SECTION 303 FOR 30 YEARS HAS BEEN RATIFIED BY CONGRESS' REPEATED REENACTMENT OF SECTION 303 WITH KNOWLEDGE OF THE SECRETARY'S INTERPRETATION

1. *The administrative practice is longstanding and consistent and Congress has ratified it*

Since 1898 the Secretary has consistently interpreted Section 303 as not requiring the imposition of countervailing duties with respect to the remission of indirect taxes (see note 5, *supra*). Congress has reenacted Section 303 without material change five times since 1897 with knowledge of the Secretary's interpretation (see Pet. Br. App.).[15] Indeed, in 1973, in the course of its most recent consideration of the statute, Congress was specifically apprised of the remission of the Japanese Commodity Tax and of petitioner's countervailing duty petition, which was

[15] Tariff Act of 1909, 36 Stat. 85; Tariff Act of 1913, 38 Stat. 192; Tariff Act of 1922, 42 Stat, 985; Tariff Act of 1930, 46 Stat. 687; Trade Act of 1974, 88 Stat. 2049.

The record reflects the fact that Congress was explicitly notified of the Secretary's interpretation of the statute no later than 1949. See Hearings on the Extension of Reciprocal Trade Agreements Act before the Senate Committee on Finance, 81st Cong., 1st Sess. 1195, 1205 (1949). Although this is the first specific record, it is difficult to believe, as the court below noted (Pet. App. 77a), that Congress had earlier re-enacted the statute four times without informing itself of Treasury's practice.

then pending before the Secretary."[16] A witness requested an amendment to the statute in order to require the Secretary to countervail the nonexcessive remission of a tax."[17] Congress refused to adopt the amendment and reenacted the relevant statutory language without change. Pub. L. 93-618, 88 Stat. 2049. Moreover, as we have noted (note 11, *supra*), the Secretary's position is expressed in international agreements to which the United States is a party.

If there were any doubt about Congress' intent when it first enacted the statute—and we think that there is none—the pattern of reconsideration and reenactment of the statute without change should resolve those doubts in favor of the Secretary's interpretation. The long-standing construction of a statute by the agency charged with its administration is entitled to great weight, particularly when, as here, that construction was first adopted shortly after the statute was enacted. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65, 74; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408.

The deference should be particularly great where Congress has reenacted the statute without change and

[16] See Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess. 2169–2171, 2496–2500, 3097, 3292–3293, 3814–3815 (1973).

[17] See Hearings on H.R. 6767, *supra*, at 2169–2171, 2496–2500, 3097, 3292–3293, 3814. See also Hearings on World Trade and Investment Issues before the Subcommittee on International Trade of the Senate Committee on Finance, 92d Cong., 1st Sess. 102, 109–111 (1971).

with knowledge of the administrative interpretation. This circumstance supports the presumption that Congress has ratified the interpretation. See, *e.g., Lorillard* v. *Pons,* No. 76–1346, decided February 22, 1978, slip op. 5; *Saxbe* v. *Bustos, supra; Helvering* v. *Winmill,* 305 U.S. 79, 83. The Secretary's "reading and application of the statute involved in this case * * * are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *National Labor Relations Board* v. *Enterprise Association,* 429 U.S. 507, 528.

Petitioner does not dispute the vintage or consistency of the Secretary's interpretation, and it does not dispute Congress' repeated reenactment of the statute without change. Petitioner argues instead that Congress' actions must be deemed to be neutral, if not hostile, with respect to the merits of the Secretary's interpretation (Br. 19–36). Petitioner relies primarily on statements in recent committee reports considering a different statute (Br. 25); on the recent enactment of provisions providing for judicial review of negative countervailing duty determinations (Br. 28–32); and on Congress' failure expressly to codify the Secretary's interpretation when he requested such a codification (Br. 20–21).

None of those grounds supports the inferences petitioner draws.[18]

[18] Petitioner's reliance (Br. 25) on statements in committee reports in 1973 and 1974 expressing neutrality on the merits of the Secretary's practice under Section 303 is unwarranted. Those reports were in connection with amendments to another statute, the Anti-Dumping Act of 1921, 42 Stat. 12, 19 U.S.C. 162, not in connection with the 1974 reenactment of Section 303. Moreover, if any inference is appropriate with respect to Congress' actions concerning the Anti-Dumping Act, it is favorable to our position, because, as petitioner admits (Br. 25), Congress adopted an amendment to the Anti-Dumping Act that the Department had requested for the express purpose of conforming the standards under that Act to the distinction between remission of direct and indirect taxes employed under Section 303.

This is also no basis for petitioner's reliance on Congress' failure to enact an amendment requested by the Department in 1950 that would have codified the Secretary's interpretation. As the court below noted (Pet. App. 77a–78a), but petitioner overlooks, the principal objection to that amendment related to a feature of the amendment that would have changed existing practice by creating a requirement that countervailing duties be imposed only when domestic injury is shown; there was no serious objection to the requested codification of existing practice. See Hearings on H.R. 5505 before the Senate Committee on Finance, 82d Cong., 2d Sess. 115, 124–125 (1952).

The 1974 amendments providing time limits for countervailing duty determinations, judicial review, and other requirements, also relied on by petitioner (Br. 27–36), have no bearing on the issue in this case.

Moreover, nothing in the events to which petitioner refers undermines the presumption that properly is drawn from Congress' reenactment of the statute. When Congress knows that the Secretary is interpreting and applying a statute in a certain way, and has been doing so for 80 years, and it then reenacts the statute without change, it would make no sense to think that Congress is hostile, or even neutral, with respect to that interpretation.[19] Reenactment of a

[19] As the court below put it (Pet. App. 77a): "we find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it."

statute with a well-known administrative construction must be viewed as acquiescence in the interpretation; otherwise Congress would have changed the statute.

2. *International trading relationships have been built on the consistent administrative interpretation of the statute*

Deference to the administrative construction of a statute is most appropriate when private relationships have grown up in reliance on that longstanding construction. Much international trade is based on the premise that the Secretary is right, and that nonexcessive remissions of indirect taxes are not subject to countervailing duties. The international trading system is based in substantial measure on United States law, and our trading partners have come to rely on the Secretary's rule. It has been embodied in the General Agreement on Trades and Tariffs (the GATT), which is followed by all major trading nations.[20]

A change in the position of the United States would have immediate and adverse effects on international trade. Indirect taxes have reached substantial levels in most major nations; these levels were fixed, at least in part, with the understanding that they would be applied only to domestic sales.[21] If countervailing du-

[20] See note 11, *supra*.

[21] For the United States, revenue from indirect taxes grew from 1.2 percent of GNP in 1902 to 4.7 percent (1974); in the United Kingdom from 1.8 percent (1900) to 9.0 percent (1974); in Germany from 1.0 percent of Net National Product (1900) to 9.0 percent of GNP (1974); in Canada from 5.0 percent of GNP (1911) to 9.6 percent of GNP (1974); and in Japan from 2.0 percent of National Income (1900) to 3.3 percent of GNP (1974). The foregoing statistics are derived from the following sources:

ties must be imposed whenever indirect taxes are remitted on exports, enormous sums of duties would be levied. In the short run, the prices of imported goods in the United States would increase substantially—by 33 percent for some goods.[22] In the long run, there would be significant economic dislocations here and abroad, as established trading patterns were disrupted, with consequent loss of employment in particular countries and industries. Our trading partners then could exercise their right, under Article XXIII of GATT, 61 Stat. A64–A65, to retaliate by imposing higher duties of their own. If there ever

Historical Statistics of the United States, Colonial Times to 1970, U.S. Department of Commerce, Bureau of the Census; *Hundred Years Statistics of the Japanese Economy*, Statistics Department, Bank of Japan, July 1966; *Revenue Statistics of OECD Member Countries*, 1965–1974, OECD 1976; *European Historical Statistics* 1750–1970, B.R. Mitchell, Columbia University Press, N.Y. 1976; *Historical Statistics of Canada*, Ed. M.C. Urquhart, MacMillan Co. of Canada Ltd., 1965. In addition, the Commerce Department estimates that, based on trade and tax data of 16 of our largest trading partners, the value of United States imports in 1976 on which indirect taxes were remitted or exempted on export exceeded $50 billion.

[22] Based on the indirect tax rates of the exporting nation, the prices of some goods we import would be likely to increase as follows: Japanese sporting equipment by 30 percent and cameras by 16 percent; French luxury goods by 33.3 percent and wines by 17.6 percent; most goods from West Germany by 11 percent; most goods from Canada by 12 percent; and most goods from the Netherlands by 18 percent. By comparison, the current average United States duty on imported goods is 3.9 percent. In short, petitioner's construction of the countervailing duty statute would virtually reenact the calamitous Smoot-Hawley Tariff of the 1930s, when duties averaged about 17 percent on imported goods. USITC: "Value of U.S. Imports for Consumption, Duties Collected, and Ratio of Duties to Values, Under the Tariff Act of 1930, 1930–1976."

were a case in which the Court should defer to the Secretary's interpretation of the statute he administers, and leave to Congress the task of changing the governing rules, this is that case.

Against all of this, petitioner argues that Congress, for so many years, has not been accepting the Secretary's interpretation of the statute at all, but has approved by acquiescence this Court's decision in *Downs* v. *United States,* 187 U.S. 496. But none of the materials on which petitioner relies indicates that Congress was aware of, let alone that it approved, petitioner's interpretation of *Downs.* That interpretation, as we show below, is erroneous. The evidence shows at most that some language in *Downs* created uncertainity. But there has never been any uncertainty about how the Secretary was interpreting and carrying out the statute, and world trading has depended on the Secretary's interpretation for almost 80 years. Because the Secretary's interpretation controlled how the statute operated in practice, it is the Secretary's interpretation that Congress must have accepted when it reenacted the statute without telling the Secretary to change his views.

D. THE ADMINISTRATIVE INTERPRETATION OF THE STATUTE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Petitioner's argument depends almost exclusively on the following passage of *Downs* v. *United States, supra,* 187 U.S. at 515:

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

The passage of *Downs* cannot be lifted from its context, however, and in context it does not support petitioner.

Downs involved the Russian sugar tax. The Secretary imposed a countervailing duty, following the same interpretation of our statute that he followed here, and the importer sought judicial review. The Russian system was very complicated, but it had two features that were significant. (1) The domestic excise taxes were remitted for all sugar exported; and (2) the exporter received a certificate entitling him to sell *additional* sugar in Russia without paying all of the excise tax on those domestic sales. The certificate had an ascertainable market value, which depended on the amount of tax that was forgiven for domestic sales. The Secretary imposed a countervailing duty equal *only* to the value of the certificate; the duty did not pertain to the amount of tax remitted for exports. In other words, the bounty was identified as the amount of excessive remission.[23]

The amount of the bounty was not at issue in *Downs,* and so neither the parties nor the Court paid partic-

[23] See A. 49–51, a memorandum from the Secretary of the Treasury that was included in the record in *Downs.* This memorandum reflects the way in which the bounty was measured by the market value of the certificates. The lower court opinions in *Downs* also discuss this fact. See 2 Treas. Dec. 996; 4 Treas. Dec. 184; 113 Fed. 144.

ular attention to the difference between the remission of the excise tax and the issuance of a certificate (the excessive remission). But the Court's opinion strongly suggests that it recognized the distinction, for it stated (187 U.S. at 515) that "[t]he amount [the exporter] receives for his export certificate [on the market], say, R. 1.25, is the exact amount of the bounty he receives upon exportation * * *." Moreover, the Court concluded its opinion by stating (*id.* at 516):

> In this connection the Circuit Court of Appeals found: "That the Russian exporter of sugar obtained from his government a certificate, solely because of such exportation, which is worth in the open market of that country from R. 1.25 to R. 1.64 per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia." We all concur in this expression of opinion.

These two statements bracket the single sentence on which petitioner relies.[24]

[24] See also the statement at 187 U.S. at 512: "It is practically admitted in this case that a bounty equal to the value of * * * [the] certificates is paid by the Russian government, and the main argument of [*Downs*] is addressed to the proposition that this bounty is paid, not upon exportation, but upon production." The Court's description of Downs' main argument refers to the fact that the statute at that time provided for the imposition of countervailing duties only when bounties were paid upon exportation but not upon production. The statute was amended in 1922 to encompass bounties on manufacture and production as well. 42 Stat. 935. That change is not significant for purposes of this case (see 61 Cong. Rec. 4132 (1922) (Rep. Hawley)).

We do not know, and cannot tell at this remove, what the Court meant by the statement that all remissions of taxes are bounties. But the statement was not responsive to the arguments of the parties or to the issues in the case.[25] It does not fit comfortably with the statements immediately before and after it in the opinion. It is perhaps best understood as unguarded language that was not informed by the focus of adversarial presentation. It therefore does not control here. See, *e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 222–224. The opinion as a whole supports the Secretary's interpretation and, after all, the Court affirmed the Secretary's decision.

[25] See the briefs in *Downs* v. *United States*, No. 318, October Term, 1902. The brief for the United States said that the only question presented was whether the Russian scheme as a whole created a bounty (Br. 1). The brief asked how the premium appears (Br. 7) and answered the question by saying (Br. 8) that the "assignment or transfer carries a consideration [the certificate] to the producer who cedes his home market right, and constitutes the concrete evidence of the premium or indirect bounty on exportation." The rest of the brief discussed the details of the Russian system. The brief distinguished "drawbacks" from excessive remissions (Br. 23), stating that drawbacks were not improper (although conceding (Br. 24) that we could not resist if some other nation wanted to impose a countervailing duty on account of remissions). The brief for Downs generally urged that the Russian system was simply a method of maintaining strict state control over domestic sugar in all aspects of production and had no effect on exports. The brief paid particular attention to the market value of the certificate (Br. 26–37) and little attention to the consequences of a remission standing alone.

Finally, it is significant that the contemporaneous judicial construction of the statute agreed with that of the Secretary. The only case construing the statute before *Downs* was *United States* v. *Hills Bros. Co.*, 107 Fed. 107 (C.A. 2). *Hills Bros.* explicitly recognized that the countervailing duty was assessed only on a remission of excise taxes exceeding the taxes paid (107 Fed. at 108–109).

The other early cases follow the same pattern. *G. S. Nicholas & Co.* v. *United States*, 249 U.S. 34, involved the imposition of a countervailing duty on whiskey and gin imported from Great Britain. The British government not only remitted domestic taxes on exports but also paid the exporter a premium of three pence on plain spirits and five pence on compounded spirits (249 U.S. at 36). The Secretary imposed a countervailing duty equal only to the premium; the remission of the excise tax was not involved in the case.[26] When the case reached this Court, the only open question was whether the premium could be seen as a legitimate offset for unique storage and other taxes imposed by Great Britain and hence not an "excessive" remission. The Court rejected that argument. It concluded that the payment was a bounty and the

[26] Petitioner concedes (Br. 17) that both the Board of General Appraisers and the Court of Customs Appeals explicitly stated in *Nicholas* that the case presented no question whether the remission of excise taxes, standing alone, would be a bounty. These statements not only demonstrate the limited scope of the issue in *Nicholas* but also demonstrate the understanding these courts had of *Downs:* they did not understand that *Downs* stood for the proposition that all remissions of indirect taxes are bounties.

ability of the Secretary to impose a countervailing duty was not defeated by the possibility that the British government had good reasons for wanting to promote exports (249 U.S. at 39–40). Here, too, although some language in the opinion appears to look in petitioner's favor, the language cannot be detached from its context—a context in which the Court affirmed the Secretary's decision to follow the same approach that he has taken here of imposing countervailing duties only on excessive remissions."[27]

E. THERE IS NO NEED FOR A FACTUAL HEARING

Petitioner argues (Br. 36–43) that the decision below was erroneous because, in petitioner's view, it was based on the court's "presumption" that the Secretary had determined that, as a matter of economic fact, the nonexcessive remission of an indirect tax does not encourage exports. Since the Secretary did not make a specific finding of fact with respect to the economic consequences of the remission of the Japanese Commodity Tax (see A. 24–25), petitioner contends that it

[27] *United States* v. *Passavant*, 169 U.S. 16, which also is cited by petitioner (Br. 14 n. 8), offers even less assistance to its position. *Passavant* did not involve countervailing duties at all; it involved the question whether a statute that required import duties to be calculated on the basis of the "actual market value or wholesale price" of the imported article in the markets of the exporting country meant that the market values were to be reduced by the amount of excise taxes remitted on export. That issue has no bearing on whether remission is a bounty. Moreover, the holding of *Passavant*—that "actual market value" was to be computed without regard to remissions—was subsequently reversed by Congress. See 70 Stat. 943, presently codified at 19 U.S.C. 1401a(d).

is inappropriate to direct summary judgment for the government.

Petitioner's argument is erroneous. As the court below stated (Pet. App. 69a), it "presumed" that the Secretary had determined that the remission of the Commodity Tax does not have the effect of a bounty or grant because

> [t]he factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack. On the contrary, the sole question on this appeal is whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law.

Indeed, petitioner argues in this Court that the issue is solely one of law (Br. 36–37) and has consistently adhered to that position throughout the litigation.[28]

In any event, petitioner and *amicus* Ford Motor Co. appear to misconceive the relevant issue. This case does not turn on the precise economic consequences of tax remissions. The issue is whether the Secretary, in interpreting the statute, has adopted a classification that is reasonable in light of the statutory purpose. It is commonplace and essential for administrators, in construing and applying their statutes, to adopt general classifications to implement the statutory purpose. Once an administrator does so, the courts must decide

[28] See, *e.g.*, Plaintiff's Reply Brief And Memorandum In Opposition To Defendant's Cross Motion For Summary Judgment, p. 37.

whether the classification of persons or transactions subject to regulation is reasonable, and whether a person or transaction falls within the class (an issue that is not disputed here);[29] the issue is not whether the regulatory treatment of each and every person or transaction within a reasonable class itself serves the statutory purpose. See, *e.g.*, *Mourning* v. *Family Publications, Inc.*, 411 U.S. 356, 374.[30]

The same principle applies here. The Secretary has formulated classifications of events. One class is the remission of taxes imposed on or with respect to a product ("indirect taxes") and another class is the remission of taxes imposed on or with respect to the producer ("direct taxes"). Those classifications,

[29] There is no dispute, nor could there be, that the Japanese Commodity Tax clearly falls within the class of "indirect taxes," as that class has been understood and applied throughout the long course of the administration of the statute. There may be cases where there is a genuine dispute about whether a particular tax that is remitted is properly deemed an indirect tax, but there is no merit to the contention of *amicus* Ford that all such possible disputes should be decided in this case, where the issue is not presented.

[30] Suppose, for example, that a statute designed to discourage nonessential use of vehicles imposes an excise tax of a certain amount on all sales of "recreational vehicles." It would certainly be reasonable for the tax collector to formulate classes of vehicles that would be subject to the tax (*e.g.*, golf carts) and classes not subject to the tax (*e.g.*, trucks), even though a particular purchaser of a golf cart might use it only for business and a purchaser of a truck might use it only for recreation. And whether the administrator may assess the tax on the sale of a golf cart is a question of law that depends on the reasonableness of his classification; it is not a question of fact that would require a determination in each case of the end use of the product purchased.

and the conclusion that nonexcessive remission of indirect taxes is not a bounty, were reasonably based on the premise—undisputed by petitioner—that indirect taxes are generally imposed by the country of consumption and that their remission by the exporting countries is essentially neutral and serves to avoid double taxation.[31] See pages 9–19, *supra.*

In short, the issue here is whether that classification and its premises are reasonable in light of the statutory purpose. It is a question of law. Neither the Secretary nor the court need decide whether the remission of a particular tax is exactly counterbalanced by the imposition of similar taxes by the importing country, or each state where the product might be sold, or the degree to which a particular Japaneses manufacturer absorbs the Commodity Tax or shifts it forward to consumers. Those questions may not be answerable, given the present state of economic knowledge (see note 10, *supra*). And it would be cumbersome to administer the statute (or indeed to conduct international trade) if such factual determinations had to be made in each case, even if they are relevant and could be made. As the Court noted in *Mourning* v. *Family Publications, Inc., supra,* 411 U.S. at 374, any such requirement would

[31] That is not to say that the classifications employed by the Secretary are necessarily the only reasonable classifications that could be drawn in light of the statutory purpose, although the purpose and legislative history of the statute strongly indicates their conformity to the legislative understanding. The classification need only be "sufficiently reasonable that it should [be] accepted by the reviewing courts." *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75.

"unreasonably encumber effective administration [of the statute] * * *."[32]

CONCLUSION

The judgment of the Court of Customs and Patent Appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Deputy Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General
LEONARD SCHAITMAN,
DAVID M. COHEN,
Attorneys.

ROBERT H. MUNDHEIM,
General Counsel,
Department of the Treasury.

APRIL 1978.

[32] Petitioner and *amicus* Ford also appear now to attack the reasonableness of the Secretary's distinction between direct and indirect taxes, arguing, for example, that the GATT rules incorporating that classification "were premised on false assumptions * * * [and] provide for unfair rather than neutral treatment to nations * * *" (Br. 38 *et seq.*; see also Ford Br. 17–28). Those arguments are erroneous on their merits, but, in any event, such factually-based attacks on the Secretary's determination were not made in the Customs Court; as the court below observed, petitioner made no attack on the factual underpinnings of the Secretary's determination, but rather relied solely on the contention that the mere remission of the Commodity Tax is a bounty as a matter of law. Petitioner cannot have it both ways.

U.S. GOVERNMENT PRINTING OFFICE: 1978

INDEX

Page

STATEMENT 1

ARGUMENT 2

THE GOVERNMENT'S BRIEF FAILS TO REFUTE THE PETITIONER'S ARGUMENT THAT THE FORGIVENESS OF THE JAPANESE COMMODITY TAX ON THE EXPORTATION OF THE SUBJECT CONSUMER ELECTRONIC PRODUCTS CONSTITUTES A BOUNTY OR GRANT 2

A. The Alleged Neutrality of Noncollection of Indirect Taxes on Exportation 2

B. Legislative History 3

C. Administrative Practice 11

D. Case Law 17

E. Factual Hearing 19

CONCLUSION 21

CITATIONS

CASES:

American Express Co. v. *United States*, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973) 4, 17

Blue Chips Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 18

Downing & Co. v. *United States*, 16 Ct. Cust. Appls. 293, T.D. 42873 (1928) 19

Downs v. *United States*, 187 U.S. 496 (1903) 2, 4, 12, 14, 17, 18

Downs v. *United States*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 5

Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) 4, 10, 11, 14, 17, 18

Nicholas & Co. v. *United States*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 4, 11, 18

Page

Nicholas & Co. v. *United States*, 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 18
Schweppes (U.S.A.), Ltd. v. *United States*, 43 Cust. Ct. 608, A.R.D. 111 (1950) 19
United States v. *Passavant*, 169 U.S. 16 (1898) 17, 18

STATUTES:

Antidumping Act of 1921, as amended (19 U.S.C. § 160 *et seq.* (Supp. V 1975)) 12, 13, 14
Tariff Act of 1890, 26 Stat. 567
Paragraph 237 ..... 5, 10
Tariff Act of 1894, 28 Stat. 509
Paragraph 182½ 5, 10
Tariff Act of 1897, 30 Stat. 151
Section 5 .....4, 9, 10
Paragraph 209 10
Tariff Act of 1930, 46 Stat. 590
Section 303 .....4, 11
Section 303(d)(2) 16
Trade Act of 1974, 88 Stat. 1978 (1975) 4, 12
Section 321 .....12, 13
Section 331 .....12, 13
19 U.S.C. § 1402 (1970) 19

MISCELLANEOUS:

26 Cong. Rec. App. 783 (1894) 6

30 Cong. Rec. (1897)
p. 1650 8
p. 1658 8
p. 1674 8
p. 1679 8
p. 1680 8
p. 1719 8
p. 2203 8
p. 2204 8

Page

p. 2707 ..... 6, 9
p. 2718 8
p. 2823 ..... 8, 9
p. 2824 ..... 8, 9
p. 2825 ..... 8, 9
p. 2826 8

H. R. Rep. No. 93-517, 93d Cong., 1st Sess. (1973) ...14, 16

Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. (1968) 12

Hearings on World Trade and Investment Issues Before the Subcomm. On International Trade of the Senate Comm. on Finance, 92d Cong., 1st Sess. (1971) 3

Laughlin & Willis, *Reciprocity* (1903) 5

Note, 46 Fordham L. Rev. 573 (1977) 18

Note, 9 Law & Pol. Int'l Bus. 1229 (1977) 18

21 Op. Att'y Gen. 80 (1894) 7

S. Doc. No. 329, 55th Cong., 2d Sess. (1898) 10

S. Rep. No. 91-431, 91st Cong., 2d Sess. (1970) 12

S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974) 16

2 Senate Comm. on Finance, *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies*, 90th Cong., 2d Sess. (1968) 12

Staff of Senate Comm. on Finance, *Summary and Analysis of H. R. 10710—the Trade Reform Act of 1973*, 93d Cong., 2d Sess. (1974) 3, 16

Tariff Hearings Before the House Comm. on Ways and Means, 54th Cong., 2d Sess. (1896) 5, 6, 8

93 Treas. Dec. 14, T.D. 54521 (1958) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the
United States Court of Customs and Patent Appeals

REPLY BRIEF FOR THE PETITIONER

STATEMENT

In its brief, the Government warns of dire consequences that it imagines would flow from reversal. It poses economic and policy issues clearly legislative in nature. It argues that its position is supported by legislative history, legislative ratification of administrative practice, and case law.

The Government's gloomy imaginings are fanciful; its legislative argument misplaced; its legal argument shallow. This reply brief so demonstrates as we respond to the points of the Government's "Argument".

ARGUMENT

The Government's Brief Fails To Refute The Petitioner's Argument That The Forgiveness Of The Japanese Commodity Tax On The Exportation Of The Subject Consumer Electronic Products Constitutes A Bounty Or Grant

A. The Alleged Neutrality of Noncollection of Indirect Taxes on Exportation

The Government urges that the remission of indirect taxes on exportation is trade neutral and serves to prevent what the Government calls "double taxation", *e.g.*, taxation by Japan on manufacturers' shipments and taxation by (most of) the States on retail sales. Not only is this argument starkly inconsistent with the United States' position stated repeatedly and forcefully over a considerable period of time (*see* petitioner's brief, 39-43), but clearly it is an argument that belongs before the Congress.

Under the countervailing duty law, as construed by this Court, the remission of an indirect tax on exportation is a bounty or grant. *Downs* v. *United States,* 187 U.S. 496 (1903). Moreover, without even considering *Downs,* the forgiveness of a cost on exportation is, indisputably, a bounty or grant. A tax is a cost and its forgiveness on exportation must be treated no differently than the forgiveness of any other cost.

Congress could have given special consideration to taxes in view of their being governmentally-imposed costs. For policy reasons, Congress could have attempted to provide for the application of countervailing duties in such a manner as to neutralize the effects of varying tax policies on international trade—but it

has not done so.[1] Unless and until Congress elects to give special treatment to the remission of indirect taxes under the countervailing duty law, such remission, like the remission of any other cost, must be countervailed.

B. Legislative History

The Government argues once again[2] that the legislative history of the 1897 countervailing duty law reveals that Congress did not consider the refund of internal taxes on exportation not in excess of taxes

---

[1] Neutralization may well not be attainable; it is certainly not attained by the present GATT rules (or the Secretary of the Treasury's practice under the countervailing duty law). Government spokesmen have recognized that indirect taxes have reached relatively high levels, that such taxes are not shifted fully forward into the price of the product sold, and that their remission at the border is not trade neutral. These officials have also recognized that the border tax adjustment rules have an influence on the distribution of activities between the government and the private sector, as many of the governmental services financed by indirect taxes may be provided through the private sector in other countries. Moreover, they have questioned whetner one aspect of government policy should be singled out for special treatment (adjusting at the border for indirect taxes), since there are not adjustments for a wide range of other government measures (including various forms of taxation) which directly affect private industry, prices, and trade. *See, e.g.,* speech of former Assistant Secretary of the Treasury John R. Petty, App. 117-138, esp. 132-134; Statement by Representative of United States on Border Taxes Before GATT Working Party, April 30, 1968, reprinted in *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 1005-1010 (1971). *See also* Staff of Senate Comm. on Finance, *Summary and Analysis of H. R. 10710 —the Trade Reform Act of 1973,* 93d Cong., 2d Sess. 99-108, esp. 103-107, 107-108 (1974).

[2] This argument of the Government did not commend itself to a single one of the eight judges of the Courts below. *See* App. A to pet., pages 9a-13a, 18a-21a, 29a-42a; App. C to pet., pages 70a, 97a n. 10.

actually paid to be a countervailable bounty or grant. We submit that the Government's approach, analysis, and conclusions in this matter are erroneous.

Firstly, this action involves section 303 of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974 (enacted in 1975); it does not involve section 5 of the Tariff Act of 1897. 30 Stat. 151, 205. The history of the present statute is rich with judicial interpretations in point, *e.g., Downs* v. *United States,* 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). Simply stated, this Court has held and the Congress, by reenactment, has agreed that tax remissions on exportation are bounties or grants within the embrace of the countervailing duty law.

Indeed, even without considering this Court's teachings that tax remission on exportation is a bounty or grant, it is clear from the various Court decisions that the language in the countervailing duty law is not "obscure, abstruse, mystic, or even ambiguous," *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 106, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); that it is broad in scope and reaches "the conferring of something" upon exportation, *Nicholas, supra,* 249 U.S. at 39; that "[i]f the word 'bounty' has a limited sense the word 'grant' has not," and "[a] word of broader significance than 'grant' could not have been used," *ibid.*; that the change in language from the 1894 statute (the addition of the word "grant") "is significant of a purpose to extend the latitude of the provision," *Nicholas, supra,* 7 Ct. Cust. Appls. at 104; and that Congress could have expressed disapproval of the various judicial readings mentioned above, but chose not to do so. *See American Express Co.* v. *United States,* 332 F. Supp. 191, 199 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973). *See also Downs* v. *United States,* 113 F. 144, 147-148 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903).

Secondly, the various debates and fragments of history upon which the Government relies do not support its argument. Contrary to the Government's suggestion, there is no common thread running through the 1890, 1894, and 1897 countervailing duty legislation. Paragraph 237 of the Tariff Act of 1890, 26 Stat. 567, 584, and paragraph 182½ of the Tariff Act of 1894, 28 Stat. 509, 521, provided for the assessment of countervailing duties, in the amount of 0.1 cent per pound, on certain sugars. Conceptually, however, the two provisions were markedly different. The 1890 law was enacted to give protection to domestic sugar *refiners,* and the mechanism for countervailing duty assessment (against refined sugar only) was activated upon the ascertainment of a difference between the export bounty on refined sugar and the export bounty on raw sugar; under the 1894 law, where tax remissions were involved, attention focused on the difference between the bounty bestowed on all sugars and the internal taxes collected on the beet or cane from which the sugar was produced.

Notwithstanding the introduction of a new concept of "net bounty" in the 1894 debates on German sugar exports (*see* Government's brief, 22), *i.e.,* excess of bounty over tax collected on beet or cane,[3] the 1890

---

[3] The concept could have had no real or practical application, since cane was not used in Germany and beet was no longer taxed in that country. *See* Laughlin & Willis, *Reciprocity,* 151, 154 (1903). A direct bounty system had replaced the system whereunder beets were taxed and excessive refunds were paid on the sugar exported. *See, e.g., id.* at 154; *Tariff Hearings Before the House Comm. on Ways and Means,* 54th Cong., 2d Sess. 618 (1896). It appears that

concept of "net bounty", *i.e.*, difference between export bounty on refined and on raw sugar, appears to have persisted in the minds of some.[4] *See, e.g.*, 30 Cong. Rec. 2707 (1897) (Remarks of Mr. Dingley); 26 Cong. Rec. App. 783 (1894) (Remarks of Mr. Quay, observing that "the bounty on German refined sugar, so far as the American refiner is concerned, is reduced to the difference between the thirteen one-hundredths cent export bonus on raw and twenty-one and one-half hundredths cent per pound on refined sugar, or only eight and one-half hundredths cent * * *."); *Tariff Hearings Before the House Comm. on Ways and Means*, 54th Cong., 2d Sess. 641-642 (1896).

The Government now depicts the countervailing duty provision of the 1897 Act as merely a restatement of the two earlier laws which were designed only to reach the actual, "net" bounty received by the German exporters. This contention is puzzling since, not only was the 1897 language radically different, but as we have taken pains to note in this reply brief, any concept of "net bounty" in the 1890 provision was markedly different from the concept in the 1894 provision. Under the former, the focal point was discrimination —as long as export benefits received on refined sugar did not exceed export benefits received on raw sugar, there were no countervailing duty consequences. Under the latter, the focal point was the excess of tax

---

Senator Jones and Senator Quay (*see* remarks made at 26 Cong. Rec. App. 783 (1894)) did not correctly understand the German law.

[4] In fact, the amount of countervail to be assessed under the 1894 provision, 0.1 cent per pound, was slightly in excess of the difference between the German export bounty on refined sugar and the German export bounty on raw sugar.

refunded on exportation over tax collected on the beet or cane—*i.e.*, a practice that had once existed under a German law which Congress did not realize was repealed.

Further, when the 1897 bill was introduced in and passed by the House of Representatives in March 1897, it contained a provision which followed the 1894 concept. Section 206 provided that all sugars, "the product of any country which pays, directly or indirectly, a bounty on the export thereof, whether imported directly and in condition as exported therefrom, or otherwise, shall pay, . . . a duty equal to such bounty, or so much thereof as may be in excess of any tax collected by such country upon such exported article, or upon the beet or cane from which it was produced." The Government argues that Congress in 1897 was concerned primarily with the laws of Germany and was conversant with those laws, yet the House of Representatives made manifest the same lack of knowledge of the German law that the 1894 Congres had done, by attempting to deal with an indirect bounty system whereunder tax is first paid on beets and later refunded in "excessive" amounts on exported sugar. We submit that Congress cannot be presumed to have had the knowledge which the Government imputes to it. *See* 21 Op. Att'y Gen. 80, 83-84 (1894), wherein the Attorney General made a comment equally appropriate for the Congress as himself: "The laws of Germany I do not and can not be expected to know . . ."

In brief, the Government's assumption that the 1897 Congress was fully conversant with the workings of the German sugar tax laws and consciously refrained from taking action against the forgiveness of the Ger-

man consumption tax on exportation cannot be justified. As Judge Boe remarked [App. A to pet., page 39a]:

> "The colloquy engaged in by the members of Congress rather would appear to emphasize the dubious familiarity and understanding on their part with respect not only to the provisions of the German Sugar Act in question, but the specific legislation under their immediate consideration. To adopt an interpretation of our countervailing duty statute upon a presumed legislative intent predicated upon the apparent limited and conflicting understanding evidenced by statements then made by some of the members of Congress, indeed, would do violence to the rules of statutory construction."

If, however, Congress were to be imputed with actual knowledge of the German Tax Law, from information on the record, and if it intended to countervail only bounties in excess of internal taxes paid, then in calculating the amount of countervailing duty against the direct bounties conferred by Germany on exportation of refined sugar ($.38 per hundred pounds) and raw sugar ($.27 per hundred pounds), its members should have made an effort to subtract from said $.38 or $.27 per hundred pounds the amount of internal tax paid.[5] This was consistently not done.[6] The members of the Congress consistently viewed the amounts of

---

[5] Under the 1896 German law, a tax was levied on the output of sugar factories of at least 10 pfennigs (2.38 cents) per 100 kilograms (the rate increasing with the volume produced). The tax was not remitted on exportation. *See Tariff Hearings Before the House Comm. on Ways and Means*, 54th Cong., 2d Sess. 617, 618 (1896).

[6] *See, e.g.*, 30 Cong. Rec. 1650, 1658, 1674, 1679, 1680, 1719, 2203-04, 2718, 2823-26 (1897). Senator Allison's remarks at 30 Cong. Rec. 1721 constitute an exception.

countervailing duty to be assessed to offset the aforedescribed direct bounties as being $.38 and $.27 per hundred pounds, respectively. *See* n.6.

In any event, an exhaustive study of the debates fails to shed greater light on the Congressional intention than the actual language of the enactment. Even after the Senate-House Conference, there was considerable confusion in the Senate, *see, e.g.*, colloquy between Senators Jones and Aldrich, 30 Cong. Rec. 2823-25 (1897), and in the House, 30 Cong. Rec. 2707 (1897) (Remarks of Mr. Dingley). Congressman Dingley (after whom the 1897 Tariff Act was named), in fact, made the astonishingly erroneous comment that section 5 of the 1897 law employed the discriminating bounty concept of the 1890 law. *Ibid.*

What the Government altogether ignores in its "legislative history" argument is the language used by Congress in section 5 of the 1897 Act. This language was entirely different from that used in previous legislation, and stated:

> "That *whenever* any country, dependency, or colony shall *pay or bestow,* directly or indirectly, *any bounty or grant* upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of *any* such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, *in all such cases,* in addition to the duties otherwise

> imposed by this Act, an additional duty equal to the net amount of such bounty or grant, *however the same be paid or bestowed.* The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties." [Italics supplied.]

Thus, whenever any export bounty or grant was paid or bestowed on dutiable merchandise, then upon the importation of any such merchandise into the United States, a countervailing duty was to be assessed, *in all such cases,* equal to the net amount of such bounty or grant. This was new legislation.[1] As the Government effectively argued in its brief before this Court in *Nicholas* (page 35):

> "Petitioners' brief in the Nicholas case seems to attempt (p. 40) to limit the effect of the term 'grant' and to contend that it means little more than 'bounty.' In paragraphs 237 of the tariff act of 1890 (26 Stat. 567, 584) and 182½ of the tariff act of 1894 (28 Stat. 509, 521) relating to countervailing duties on sugar, Congress used only the word 'bounty.' Section 5 of the tariff act of 1897 (30 Stat. 151, 205) broadened the counter-

[1] In *S. Doc. No. 329,* 55th Cong., 2d Sess. (1898), a comparison of Tariff Acts of 1897, 1894, and 1890 is presented. At pages 62-64, paragraph 237 (and other provisions in the sugar schedule) of the Tariff Act of 1890, paragraph 182½ (and other provisions in the sugar schedule) of the Tariff Act of 1894, and paragraph 209 (sugar provision) of the Tariff Act of 1897 are grouped together. Section 5 of the 1897 Act is not included in this group. However, at pages 178-179, where the text of section 5 does appear, as an 1897 provision, the following notations properly appear next to "1894" and "1890": "[NOTE.—No similar provision.]."

> vailing duty provision. Therein Congress used the additional verb 'bestow' and the additional noun 'grant,' thus manifesting a purpose to make the provision broad and all-inclusive. The purpose of Congress to cover everything in the nature of a bounty or grant is expresed in the language 'shall pay or bestow, directly or indirectly, any bounty or grant,' and again, 'however the same be paid or bestowed'."

Clearly, this Court agreed with the Government, *see Nicholas, supra.* 249 U.S. at 39, as did the Court of Customs Appeals, *see Nicholas, supra,* 7 Ct. Cust. Appls. at 104.

The Government's present argument that Congress' use of the ordinary word "net" in the expression "net amount of such bounty or grant" was Congress' way of telling the public that it wished merely to reenact the 1894 provision (although extending the coverage to products other than sugar) and not to countervail grants (tax remissions) which do not exceed taxes collected simply defies reason. *See* opinions of the judges of both Courts below, cited at n. 2, *supra.* Had Congress wished to continue the 1894 proviso in effect, it could have said so without any difficulty.

C. ADMINISTRATIVE PRACTICE

The Government boldly asserts that Congress has reenacted section 303 without material change five times since 1897 *with knowledge* of the Secretary's interpretation regarding tax remissions and that these reenactments demonstrate that Congress has ratified that in-

terpretation.[8] Actually, the only reenactment that can be said to have been made with knowledge of the Secretary's interpretation was the last one, *i.e.*, the Trade Act of 1974, and there the key Congressional committees took pains to assert that they were neither approving nor disapproving that interpretation.

Nevertheless, the Government insists that Congress ratified Treasury's practice. It seeks to avoid the aforesaid Committee statements by asserting that they were made in connection with amendments to another statute, *viz.*, the Antidumping Act of 1921 (19 U.S.C. § 160 *et seq.* (Supp. V 1975)). We submit that this argument cannot withstand scrutiny. The Trade Act amendments to both the Antidumping Act and the countervailing duty law appear in Title III of the Trade Act, "Relief from Unfair Trade Practices," as sections 321 and 331, respectively. 88 Stat. 1978, 2043, 2049. The sections are clearly interrelated, with each section referring to both the Antidumping Act and the countervailing duty law. For the Government to say that remarks made by the Committees with respect to section 321 of the Trade Act can have no bearing on the Congressional intent

[8] The Government is prepared to *assume* that the first four reenactments were made with such knowledge. Government's brief, 24. The Government is not prepared to assume that Congress had knowledge of "petitioner's interpretation of [this Court's teachings in] *Downs*" at all. *Id.* at 30. Not only is the choice of assumptions puzzling, but evidently the Government has overlooked numerous materials making manifest a Congressional awareness of *Downs*, as we "interpret" it. *See, e.g.*, 2 Senate Comm. on Finance, *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies*, 90th Cong., 2d Sess. 568-569, 887-888, 918-919 (1968); *Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means*, 90th Cong., 2d Sess. 2216-2219, 2220-2221, 2227 (1968); *S. Rep. No. 91-1431*, 91st Cong., 2d Sess. 284-285 (1970).

behind section 331 of the Trade Act is simply unsupportable.

The Government proceeds to claim that any inference that is appropriate with respect to Congress' actions concerning the Antidumping Act must be favorable to the Government's position because Congress adopted an amendment to the Antidumping Act that the Treasury Department had requested for the express purpose of conforming the standards under that Act to the distinction between the remission of direct and indirect taxes employed under section 303. Once again the Government errs. It refuses to recognize that each key Committee has expressly indicated that it was not ratifying Treasury's practice, and that the Committees (and the Congress) did not accept the Department's proposal intact. Although Congress amended the definition of "purchase price" (in the Antidumping Act) by permitting the addition to the price of "the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected by reason of the exportation of the merchandise to the United States," as the Treasury Department had proposed, Congress also added a proviso which the Treasury Department did not propose and which conflicts with Treasury's practice under the countervailing duty law. The aforementioned taxes may be added to make "purchase price" "*but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.*" Section 321(b), Trade Act of 1974 (emphasis supplied). The Committee on Ways and Means explained

the purpose of this proviso, as follows (*H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973)):

> "With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated. Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased."

Thus, Congress expressed its recognition that indirect taxes imposed on the product may not shift forward into the price but may be absorbed by the seller, and further, to the degree that they are so absorbed, they should not reduce any margin of price discrimination (dumping). Under Treasury's countervailing duty *practice,* however, no inquiry is made into tax shifting: rather, every remission of indirect taxes imposed on a product is excused from countervail. Thus, even were the Government to look to the amendments to the Antidumping Act as guidance to the Congressional intention behind the countervailing duty law, it would fail to find support for its position.

Moreover, by the time of the enactment of the Trade Act, Congress clearly had become aware of the fact that this Court, in *Downs* and *Nicholas,* had placed an

interpretation on the countervailing duty statute which conflicted with the Secretary of the Treasury's.[9] All that was necessary to achieve the result commanded by those Court decisions—and to reverse the administrative practice—was to subject that practice to judicial review by opening the courts to American manufacturers who were adversely affected by a refusal to impose countervailing duties. This is precisely what Congress did. The Government's disavowal of the Trade Act's judicial review provision as irrelevant (Government's brief, 27 n. 18) simply avoids the issue.

Finally, the Government's plea that the Court should take into consideration the allegedly harmful effects on international trade that would result from a decision in petitioner's favor is an invitation by the Executive Branch to the Court to join in its persistent effort to defy the Congressional objective, as previously articulated by this Court. *See* Government's brief, 28-30. Congress knew that many countries had export assist programs which were countervailable under our law; it knew that the application of countervailing duties could lead to international friction; it recognized that the best solution to the problem of bounties and grants in international trade was the establishment through negotiations of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties. However, Congress also was mindful of the harmful effect on domestic industry of having to compete with bounty-fed import competition; it was determined to have the countervailing duty law enforced, in a timely manner, to afford domestic

---

[9] *See, e.g.,* materials cited in n. 8, *supra.*

industry the requisite protection. Weighing the need for such protection against the harm that the application of countervailing duties could do to the negotiating process, Congress provided the Secretary of the Treasury with a *partial* and *temporary* escape valve—section 303(d)(2) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(d)(2) (Supp. V 1975)). *See H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973); Staff of Senate Comm. on Finance, *Summary and Analysis of H. R. 10710—the Trade Reform Act of 1973,* 93d Cong., 2d Sess. 50-51 (1974); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183-188 (1974).

The Government does not attempt to explain the reasoning and purpose of this carefully drawn statutory scheme; rather it ignores it, contenting itself to inject into this case aliunde the record below a species of *in terrorem* argumentation to frighten this Court into affirmance by asserting that the practical alternative to affirmance is a far-reaching despair.[10] The Govern-

[10] Actually, the Government's pessimistic forecast, with its conjectural statistics, its "short run" inflationary disturbances, and "long run" economic disasters, is grossly exaggerated and misleading. A reversal by this Court would *not* lead to the immediate assessment of countervailing duties on a wide range of imported products. Petitions would first have to be filed with and considered by the Secretary of the Treasury (or his delegate). The Secretary will have one year to act on such petitions. He will consider whether there are factors which distinguish such cases from this one. If he determines that the decision in this case compels him to conclude that a bounty or grant has been bestowed, he may then consider whether to invoke the postponement authority of section 303(d)(2) (assuming that the postponement authority is extended beyond January 3, 1979).

In the meantime, the United States and its trading partners will be involved in international negotiations, precisely in accordance with the Congressional contemplation. An agreement could be reached and found acceptable to Congress. In the absence of an acceptable agreement, Congress, of course, would still be free to amend the law should it be persuaded that it was in the nation's interest to do so.

ment's argument would dishonor our Constitutional system and convert this Court into a part of the policy-making apparatus of the Executive Branch, dissolving the checks and balances of the Legislative and Judicial Branches. *See* opinion of Judge Boe, App. A to pet., page 50a.

D. Case Law

The Government dismisses this Court's statement in *Downs* that remissions of tax on export are bounties as "unguarded language that was not informed by the focus of adversarial presentation." Government's brief, 33. However, not only did the parties in *Downs* clearly focus on the tax remission issue (*see* petitioners' brief, 12-14"), but the Court's forceful statement can hardly be viewed as "unguarded" when (1) it is consistent with deliberate statements made elsewhere in its opinion (187 U.S. at 502), (2) it is consistent with deliberate statements made in opinions delivered both before and after *Downs* (*United States* v. *Passavant,* 169 U.S. 16, 22, 23 (1898); *Nicholas & Co.* v. *United States,* 249 U.S. 34, 41 (1919)), and (3) it is prefaced by the Court's remarks that the two most important facts of the elaborate Russian program were that sugar

[11] Also, as the Customs Court observed in *American Express Company* v. *United States,* 332 F. Supp. 191, 198 n. 3 (Cust. Ct. 1971), *aff'd,* 472 F.2d 1050 (C.C.P.A. 1973), a substantial portion of the dissenting opinion of General Appraiser Tichenor in the *Downs* case is devoted "to arguing against tax remission as a bounty or grant, thus making clear that remission of taxes was a factor in the case from the outset."

on the home market was subject to tax and sugar exported paid no tax at all. 187 U.S. at 515. Moreover, the long list of authorities which have interpreted *Downs* as holding the remission of tax on export to be a bounty [12] is entitled to great weight. *See Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 733 (1975).

The Government's discussion of *Nicholas* is also marred by its attempt to restructure the Court's reasoning so as to coincide with the Secretary of the Treasury's approach of countervailing only "excessive" remissions.[13] This Court determined that the "allowance" in *Nicholas* was a bounty or grant—not because it was given in excess of a remitted excise tax, but because it constituted the conferral of a benefit on exportation. 249 U.S. at 39-40. In fact, as noted, the Court supported its conclusion by remarking that the remission of an excise tax on exportation is an example of a bounty or grant. *Id.* at 41.

Finally, the Government's efforts to dispose of *Passavant* (Government's brief, 34 n. 27), also fail. While *Passavant* did not involve countervailing duty, that

[12] *See* petitioner's brief, 11-12 n. 6. *See also* Note, 9 Law & Pol. Int'l Bus. 1229 (1977) and Note, 46 Fordham L. Rev. 573 (1977), both of which are critical of the Court of Customs and Patent Appeals' decision in this case in general and of that Court's reading of *Downs* in particular.

[13] Similarly, the Government is incorrect in stating that the lower courts in *Nicholas* did not understand that *Downs* stood for the proposition that all remissions of indirect tax are bounties (Government's brief, 34 n. 26). *See, e.g., Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, 62-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 105, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919).

opinion was cited in the only two countervailing duty decisions of this Court and exhibits this Court's recognition that the remission of a tax on export is an export assist, given "[d]oubtless[ly] to encourage exportation and the introduction of . . . [domestically manufactured] goods into other markets." 169 U.S. at 22.[14]

E. Factual Hearing

We agree with the Government that there is no need for a factual hearing. We agree that the issue here is one of law.

However, the Court below, in ruling for the Government, did not find that the remission of the Japanese commodity tax on exportation is not a bounty or grant as a matter of law but rather relied on a presumption that a determination had been made regarding economic result. We submit that that Court erred. Firstly, as a matter of law, the remission of the tax is a bounty or grant. Secondly, as a matter of procedure, summary judgment should not have been premised on a presump-

[14] The Government's statement that *Passavant* was reversed by Congress is inaccurate and misleading. That remitted taxes are not now included in the computation of value for ordinary customs duty purposes for most imports is, of course, irrelevant. But, in any event, remitted taxes are still included in dutiable value for many imported products, when appraisement is based on "foreign value" or "cost of production", as those terms appear in 19 U.S.C. § 1402 (1970). *See, e.g., Downing & Co.* v. *United States,* 16 Ct. Cust. Appls. 293, 300, T.D. 42873 (1928); *Schweppes (U.S.A.), Ltd.* v. *United States,* 43 Cust. Ct. 608, A.R.D. 111 (1950). For a list of those products appraised under 19 U.S.C. § 1402, *see* 93 Treas. Dec. 14-51, T.D. 54521 (1958).

tion.[15] Thirdly, as a matter of fact, that which was presumed did not occur. The decision not to countervail was clearly *not* made on the basis of an economic determination that no benefit is conferred on exportation, but rather was made in spite of the recognition that such a benefit is conferred. *See* petitioner's brief, 39-43.[16]

Thus, under the circumstances, no further hearing is necessary.

---

[15] If the Court below believed that the "economic result" of the tax remission is decisive of the issue, it should have remanded, as Judge Miller stated in dissent, "to the Customs Court for development of a record on that point, a task that Court is specially equipped to undertake." App. C to pet., pages 88a-89a n. 6. [The Customs Court hears cases *de novo;* a remand to the Secretary of the Treasury would have been improper.]

[16] It is difficult to understand how the Government can characterize our factual observations [that the GATT rules regarding direct and indirect taxes "were premised on false assumptions • • • [and] provide for unfair rather than neutral treatment to nations • • •"] as new argument, not made before the Customs Court (Government's brief, 39 n. 32), since they are *identical* to those which we made to the Customs Court. *See* Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment, 25, 25-29. It is also difficult to understand how the Government can flatly dismiss those observations as erroneous, when they are based entirely on a continuous line of statements and analyses made by Executive Branch officials. *See* authorities cited in petitioner's brief, 39-43; *see also* opinion of Judge Newman of the Customs Court, App. A to pet., pages 29a-35a, 36a-37a.

CONCLUSION

The judgment of the Court of Customs and Patent Appeals should be reversed and the case should be remanded to enable that Court to decide the proper effective date for duty assessment purposes.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

April 1978

MOTION FILED
APR 7 1978

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

Motion of Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers, and Foreign Trade Association of Southern California for Leave to File Brief as Amici Curiae and Brief of Amici Curiae in Support of Dismissal on Grounds of Unconstitutionality of 19 U.S.C. § 1516(d).

MARJORIE M. SHOSTAK,
S. RICHARD SHOSTAK,
3435 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 389-2105,

THEODORE B. OLSON,
515 South Flower Street,
Los Angeles, Calif. 90071,
(213) 488-7000,
Attorneys for Amici Curiae.

Of Counsel:
JAMES F. O'HARA,
STEIN, SHOSTAK, SHOSTAK & O'HARA, INC.,
REX S. HEINKE,
GIBSON, DUNN & CRUTCHER,
April 1978

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Motion for Leave to File Brief as Amici Curiae 1

Brief of Amici Curiae Craig Corporation, Superscop, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers and Foreign Trade Association of Southern California 5

Interest of Amici Curiae 5

Summary of Argument 7

Argument 9

A. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Due Process Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516 (d) 9

B. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Equal Protection Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516 (d) 14

Conclusion 17

TABLE OF AUTHORITIES CITED

Cases — Page

Airco, Inc. v. U.S. (Unpublished order of U.S. Customs Court Dec. 12, 1977), Civ. No. 76-3-00643 17

Armstrong v. Manzo (1965), 380 U.S. 545, 14 L. Ed.2d 62 ..... 11, 12

Atlantic Development Corp. v. U.S. (5th Cir. 1967), 379 F.2d 818 13

Atlantic Refining Co. v. Standard Oil Co. (D.C. Cir. 1962), 304 F.2d 387 ..... 12, 13

Board of Regents v. Roth (1972), 408 U.S. 564, 33 L.Ed.2d 548 10

Boddie v. Connecticut (1971), 401 U.S. 371, 28 L.Ed.2d 113 14

Bounds v. Smith (1977), 430 U.S. 817, 52 L.Ed.2d 72 14

California Transport v. Trucking Unlimited (1972), 404 U.S. 508, 30 L.Ed.2d 642 14

Dean Milk Co. v. City of Madison (1951), 340 U.S. 349, 95 L.Ed. 329 16

Holmes v. Government of Virgin Islands (D.V.I. 1973), 61 F.R.D. 3 13

James v. Strange (1972), 407 U.S. 128, 32 L. Ed.2d 600 15

Korematsu v. United States (1944), 323 U.S. 214, 89 L.Ed. 194 15

McGinnis v. Royster (1973), 410 U.S. 263, 35 L. Ed.2d 282 15

Page

NAACP v. Button (1963), 371 U.S. 415, 9 L. Ed.2d 405 14

National Farm Lines v. I.C.C. (10th Cir. 1977), 564 F.2d 381 13

New England Petroleum v. Federal Energy Administration (S.D.N.Y. 1976), 71 F.R.D. 454 13

New York Public Interest Research Group, Inc. v. Regents (2d Cir. 1975), 516 F.2d 350 13

Nuesse v. Camp (D.C. Cir. 1967), 385 F.2d 694 ..... 12, 13

Pence v. Kleppe (9th Cir. 1976), 529 F.2d 135 11

Perry v. Sindermann (1972), 408 U.S. 593, 33 L.Ed.2d 570 11

Shapiro v. Thompson (1969), 394 U.S. 618, 22 L. Ed.2d 600 ..... 14, 15

Textile Workers Union of America v. Allendale Co. (D.C. Cir. 1955), 226 F.2d 765, cert. den., 351 U.S. 909 12

Trobovich v. United Mine Workers of America (1972), 404 U.S. 528, 30 L.Ed.2d 686 13

United States v. Hammond Lead Products, Inc. (1971), 58 CCPA 129, C.A.D. 1017, 440 F.2d 1024, cert. den., 404 U.S. 1005 ..... 15, 16

United States v. Jackson (1968), 390 U.S. 570, 20 L.Ed.2d 138 16

United States v. Robel (1967), 389 U.S. 258, 19 L.Ed.2d 508 16

Page

United States v. Zenith Radio Corp. (1977), 64 CCPA ...., C.A.D. 1195, 562 F.2d 1209, cert. granted, No. 77-539, 46 U.S.L.W. 3511 (Feb. 21, 1978) 11

United Transportation Union v. Michigan (1971), 401 U.S. 576, 28 L.Ed.2d 339 14

Miscellaneous Page

Congressional Report No. 93-1644, 93d Congress, 2d Sess. (1974) 16

Senate Report No. 93-1298, 93d Congress, 2d Sess. (1974) 16

4 United States Code of Congressional and Administrative News, pp. 7320, 7389 16

Rules

Federal Rules of Civil Procedure, Rule 24 17

Statutes

Tariff Act of 1930, Sec. 303 6

United States Code, Title 19, Sec. 3 13

United States Code, Title 19, Sec. 1303 .....6, 9, 11

United States Code, Title 19, Sec. 1505 13

United States Code, Title 19, Sec. 1514 10

United States Code, Title 19, Sec. 1515 10

United States Code, Title 19, Sec. 1516(c) 7, 9, 15, 16

United States Code, Title 19, Sec. 1516(d) 2, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18

United States Code, Title 19, Sec. 1516(f) 7

United States Code, Title 28, Sec. 1582(a) 10

United States Code, Title 28, Sec. 1582(c) 10

United States Constitution, First Amendment 14, 15

United States Constitution, Fifth Amendment 7, 10, 11

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

Motion of Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers, and Foreign Trade Association of Southern California for Leave to File Brief as Amici Curiae and Brief of Amici Curiae in Support of Dismissal on Grounds of Unconstitutionality of 19 U.S.C. § 1516(d).

Motion for Leave to File Brief as Amici Curiae.

Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers and Foreign Trade Association of Southern California (hereinafter "*Amici*") here-

by respectfully move for leave to file the attached brief as *amici curiae* in this case. The consent of the attorneys for the petitioner and the respondent was requested but refused. These refusals are symptomatic of *Amici's* basic complaint that *Amici* have been excluded from participation in this litigation from the outset notwithstanding that they are the entities who will be most directly affected by the outcome.

Amici and others similarly situated import Japanese electronic products upon which countervailing duties will be imposed if the Zenith Radio Corporation prevails in this litigation.* They are, *de facto*, the real parties in interest in this dispute. Nevertheless, the statutory provision under which this litigation has been pursued fails to allow participation by the parties who will have to pay the countervailing duties which Zenith seeks to have imposed.

Amici seek to raise an issue which has not been raised by either party to these proceedings—the constitutionality of 19 U.S.C. § 1516(d) under which Zenith has brought this action. Neither of the litigants has any motivation for considering this issue. Zenith Radio Corporation is undoubtedly comfortable with a procedure which allows it to bring this action unencum-

*All of the individually named *Amici* are United States companies which import large quantities of Japanese consumer electronic products of the type which will be subjected to countervailing duties if Zenith Radio Corporation prevails in this litigation. *Amicus* Association of Electronic Importers is an organization of thirteen of the largest United States firms which import such Japanese electronic consumer products. *Amicus* Foreign Trade Association of Southern California is an association of more than 460 importing, exporting and service firms engaged in international trade, vitally interested in the impact and effect of this litigation on international trade.

bered by opposition from the parties upon which they seek to impose substantial competitive disadvantages. The United States Department of Justice is not likely to be interested in arguing that a federal law is unconstitutional because of its obligation to uphold and defend such laws. Yet the issue must be considered because, if *Amici* are correct, a binding decision imposing countervailing duties cannot be rendered in the case now before the Court.

Amici respectfully submit that the issue which they seek to raise cannot be avoided and considerations of fairness, justice and judicial economy require that it be considered at this time.

Respectfully submitted,

MARJORIE M. SHOSTAK,
S. RICHARD SHOSTAK,
and
THEODORE B. OLSON,
Attorneys for Amici Curiae.

Of Counsel:
JAMES F. O'HARA,
STEIN, SHOSTAK, SHOSTAK & O'HARA, INC.,
REX S. HEINKE,
GIBSON, DUNN & CRUTCHER.

April 1978

Brief of Amici Curiae Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc., Kraco Enterprises, Inc., Association of Electronic Importers and Foreign Trade Association of Southern California.

Interest of Amici Curiae.

Craig Corporation, Superscope, Inc., Marantz Company, Inc., Akai America, Ltd., Clarion Corp. of America, J.I.L. Corp. of America, Inc., Kenwood Electronics, Inc., Pioneer Electronics of America, Sanyo Electric, Inc. and Kraco Enterprises, Inc. are United States companies which import large quantities of Japanese consumer electronic products upon which substantial countervailing duties will be imposed if this Court reverses the decision of the United States Court of Customs and Patent Appeals in this case.

Amicus Association of Electronic Importers is an organization of thirteen of the largest United States firms importing Japanese electronic consumer products upon which countervailing duties in amounts totaling over fifty million dollars will be imposed if this Court reverses the decision of the United States Court of Customs and Patent Appeals in this case.

Amicus Foreign Trade Association of Southern California is an association of more than 460 importing, exporting, and service firms engaged in international trade and vitally interested in the impact and effect this litigation has had and will have on the importing industry and international trade. The members of the Association include more than 110 firms engaged in

importing products from various countries throughout the world, including many members importing Japanese consumer electronic products.

On April 12, 1977, the United States Customs Court determined that the exemption from taxes of certain electronic products when exported from Japan granted by the Commodity Tax Law of Japan constitutes the payment or bestowal of a bounty or grant within the ambit of Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303). It ordered customs officers throughout the United States to immediately assess countervailing duties on such products upon their importation into the United States.

Amici, and others like them, are the importers of these products. They are the parties which will be required to pay the substantial duties which will be imposed if the Customs Court decision is upheld. Such duties will increase the cost of these products to the importers and ultimately to the consumers. The competitive disadvantage to *Amici,* if duties ranging from 5 to 40% are added to the cost of goods sold, is self-evident.

Of all the interests which will be affected by the outcome of this litigation, only those of the importers have been unrepresented. The American manufacturers of comparable products have been ably and vigorously represented by the Zenith Radio Corporation (hereinafter "Zenith"). The interests of public and foreign policy are represented by the United States. However, the parties who must pay the duties and whose sales of products have been and will be directly influenced by this litigation have been denied an opportunity to be heard. There is no one presently before this

Court who has any interest in pointing out that the procedure which brings this dispute to this Court is constitutionally defective. Only *Amici* can effectively do so.

Summary of Argument.

Under either 19 U.S.C. § 1516(c) or (d), as amended by the Trade Act of 1974, an American manufacturer may contest a decision of the Secretary of the Treasury *not* to impose countervailing duties (a decision which is commonly referred to as a "negative determination"). In § 1516(c) proceedings, the American manufacturer is the plaintiff, the United States is the defendant, and the importer of the goods in question participates as the real party in interest (19 U.S.C. § 1516(f)). In § 1516(d) proceedings (such as in the present case), the American manufacturer is the plaintiff, and the United States is the defendant, but *importers of the goods subject to countervailing duties are not parties.* Under § 1516(d), importers who may be subjected to countervailing duties are not allowed to participate in the judicial process which bears directly upon their interests.

Section 1516(d) violates the guarantees of procedural due process accorded by the Fifth Amendment to the Constitution of the United States because *Amici* and all those similarly situated are deprived of notice of or any meaningful opportunity to be heard in this judicial proceeding brought by one of their competitors, Zenith, against the Secretary of the Treasury, which proceeding directly affects their interests by exposing their goods to the imposition of countervailing duties. Section 1516(d) also violates the equal protection guarantees of the Constitution. Access to the courts is

a fundamental constitutional right. There is no compelling interest nor any rational reason justifying the exclusion of *Amici* from § 1516(d) proceedings. Allowing one interest access to the courts while denying access in the same proceedings to all interests who wish to assert contrary positions and who are even more directly affected by the outcome of the dispute is an unconstitutional violation of equal protection.

ARGUMENT.

A. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Due Process Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516(d).

An appreciation of the procedures whereby countervailing duty determinations are made and challenged is fundamental to an analysis of the constitutional issues raised by *Amici*. Section 1303 of Title 19, United States Code, sets forth the circumstances pursuant to which countervailing duties are to be imposed and provides an administrative procedure which allows any person an opportunity to seek to assert administratively the position that the imposition of such duties are required in particular circumstances. If imposed, the countervailing duties may be challenged by an importer only after liquidation of its entries of the affected imported merchandise. If not imposed, an American manufacturer may challenge the negative determination pursuant to the procedures set out in 19 U.S.C. § 1516 (c) or (d).

Section 1516(c) establishes a procedure which involves the importer, the American manufacturer and the United States. The refusal by the Secretary of the Treasury to impose countervailing duties on specific imported merchandise provides the focus for the litigation. Section 1516(d), on the other hand, allows an American manufacturer to initiate a general challenge of a negative determination by the Secretary of the Treasury without regard to any specific shipment, in litigation which does not contemplate participation by importers. If the decision in litigation brought under § 1516(d) is adverse to importers, their goods imported subsequent to the effective date of the Customs Court

decision will be subjected to countervailing duties. When the duty assessment process is completed and the entries of such goods are liquidated (finalized by the United States Customs Service), the importers are *then* permitted to challenge the imposition of countervailing duties on specific goods in specific shipments by protests under 19 U.S.C. §1514. Only after the protests have been denied under 19 U.S.C. §1515 may litigation be initiated in the United States Customs Court under 28 U.S.C. § 1582(a) and (c), long after there has been a judicial decision upon the legality of the imposition of the countervailing duties.

The instant litigation is a classic example of the workings of Section 1516(d). The American manufacturer, Zenith, has been able to prosecute this action solely against the government, unhindered by the opposition of the importers upon whose goods the duties are to be imposed. If this Court decides that countervailing duties should be imposed in this case, the very importers who must pay the duties will not have an opportunity to challenge the impost until after their entries are liquidated. At that time, they will be in the untenable position of presenting to the Customs Court issues which *the United States Supreme Court has already resolved.*

The Fifth Amendment to the Constitution of the United States prohibits the government from depriving any person of "life, liberty, or property without due process of law." *Amici's* imports are, of course, property for Fifth Amendment purposes because *Amici* are entitled to the ownership and control of such goods under state law (*Board of Regents v. Roth* (1972), 408 U.S. 564, 571, 33 L.Ed.2d 548, 557). In addition,

since 1898, the government has uniformly refused to impose countervailing duties as a consequence of the non-excessive remission of taxes by a foreign country upon the exportation of such products to the United States (*United States v. Zenith Radio Corp.* (1977), 64 CCPA ...., C.A.D. 1195, 562 F.2d 1209, 1218-1219, *cert. granted,* No. 77-539, 46 U.S.L.W. 3511 (Feb. 21, 1978)). This 80-year-old administrative interpretation, dating from only one year after the passage of 19 U.S.C. § 1303, created an extant rule and understanding giving rise to *Amici's* Fifth Amendment property interest in their imports (*Perry v. Sindermann* (1972), 408 U.S. 593, 601, 33 L.Ed.2d 570, 580 and *Pence v. Kleppe* (9th Cir. 1976), 529 F.2d 135, 141).

Amici have been deprived of their property without due process because they were not given notice or a meaningful opportunity to participate in the instant Section 1516(d) proceeding. Squarely on point is *Armstrong v. Manzo* (1965), 380 U.S. 545, 14 L.Ed. 2d 62. In *Armstrong,* Petitioner challenged the validity of his ex-wife's adoption of their child on the ground that he had been given no notice or opportunity to be heard in the adoption proceedings. This Court unanimously held:

> "A fundamental requirement of due process is 'the opportunity to he heard.' [Citation omitted] *It is an opportunity which must be granted at a meaningful time and in a meaningful manner.* The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the [adoption] decree and consider the case anew. *Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied*

had due process of law been accorded to him in the first place. His motion should have been granted." [Emphasis supplied]

Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66-67

The holding in *Armstrong* is precisely dispositive of the issue raised by *Amici.* In the instant case, when and if *Amici* finally obtain a hearing in the Customs Court to argue that countervailing duties should not be imposed on their goods, they will be faced with factual and legal determinations by the United States Supreme Court that the electronics products they import from Japan are subject to countervailing duties. With the facts and law having already been determined against them by the highest court in the land, *Amici* could not possibly obtain a *meaningful* opportunity to be heard in the Customs Court. Such a hearing *after* the judicial "slate" has already been covered with factual and legal findings against them violates the principle articulated in *Armstrong.* Nor can the Customs Court remedy the situation because it would undoubtedly consider itself bound by this Court's decision.

The present litigation will, for all *practical purposes,* resolve the issue of the imposition of countervailing duties with respect to *Amici's* products. This is especially true in the instant circumstances because this litigation raises a question of first impression with a critical impact on international trade (*Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694, 702) and because it will set a nationwide policy (*Textile Workers Union of America v. Allendale Co.* (D.C. Cir. 1955), 226 F.2d 765, 767, *cert. den.,* 351 U.S. 909; *Atlantic Refining*

Co. v. Standard Oil Co. (D.C. Cir. 1962), 304 F.2d 387, 394).* *Amici* are entitled to a *meaningful* opportunity to be heard while the judicial "slate" is still clean. *Atlantic Development Corp. v. United States* (5th Cir. 1967), 379 F.2d 818, 829.

Nor can it be argued that the government is an adequate representative of *Amici's* interests in this proceeding. It is the general rule that the government is not an adequate representative of a private party's interest (*Trobovich v. United Mine Workers of America* (1972), 404 U.S. 528, 538, n. 10, 30 L.Ed.2d 686, 694, n. 10; *National Farm Lines v. I.C.C.* (10th Cir. 1977), 564 F.2d 381, 384; *Holmes v. Government of Virgin Islands* (D.V.I. 1973), 61 F.R.D. 3, 5, and *New England Petroleum v. Federal Energy Administration* (S.D.N.Y. 1976), 71 F.R.D. 454, 459).

The government is a particularly inappropriate representative of *Amici's* interest in this case because the Secretary of the Treasury is charged with the obligation of raising and collecting customs duties. 19 U.S.C. §§ 3 and 1505. He can hardly adequately represent *Amici's* interests since they challenge the imposition of countervailing duties, which would generate new revenue for the United States. Because it is his duty to uphold the laws of the United States, the Secretary has also failed to raise the important issue that *Amici* are trying to raise now, *viz.,* that 19 U.S.C. § 1516(d) is unconstitutional. By opposing *Amici's* participation, he even opposes bringing this issue to the attention

*Participation as *Amici Curiae* in this case, which has been resisted both by Zenith and the government, does not give *Amici* their right to notice and a meaningful opportunity to be heard (*New York Public Interest Research Group, Inc. v. Regents* (2d Cir. 1975), 516 F.2d 350, 352, n. 3 and *Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694, 704, n. 10).

of the Court. Finally, since important international policies as well as issues significant to the national economy, involving potent political forces, are involved, such factors may easily affect the arguments which the government chooses to advance or the vigor with which they are presented.

This Court has been ever mindful of the principle that the truest guarantee of just and equitable judicial decisions is full and effective participation by all directly concerned. The litigation before this Court cannot abide by that principle as long as it excludes *Amici* and other importers who will bear the direct monetary impact of any decision imposing countervailing duties.

B. Importers of Goods Subject to the Imposition of Countervailing Duties Are Denied Equal Protection Because They Cannot Participate in Proceedings Pursuant to 19 U.S.C. § 1516(d).

Access to the courts is a fundamental constitutional right embraced within the First Amendment's guarantee of the right to petition the government for the redress of grievances. *California Transport v. Trucking Unlimited* (1972), 404 U.S. 508, 510, 30 L.Ed.2d 642, 646; see also *Bounds v. Smith* (1977), 430 U.S. 817, 828, 52 L.Ed.2d 72, 83; *NAACP v. Button* (1963), 371 U.S. 415, 430-431, 9 L.Ed.2d 405, 416-417 and *United Transportation Union v. Michigan* (1971), 401 U.S. 576, 587, 28 L.Ed.2d 339, 347. This is especially true where, as here, the only way in which the dispute may be resolved is in the courts (*Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L.Ed.2d 113).

A compelling governmental interest must be shown to justify the denial of *Amici's* constitutional right of access to the courts (*Shapiro v. Thompson* (1969),

394 U.S. 618, 634, 22 L.Ed.2d 600, 615)—especially where their competitors are allowed access to such courts. No such compelling interest justifies *Amici's* exclusion from the § 1516(d) proceedings. (Compare *Korematsu v. United States* (1944), 323 U.S. 214, 89 L.Ed. 194.) Indeed, the existence of Section 1516 (c), which allows a negative countervailing duty determination to be challenged in a truly adversary proceeding, implicitly recognizes that Section 1516(d) is not in any way essential to the testing of such administrative decisions. Since Section 1516(d) infringes a fundamental constitutional right—the First Amendment right of access to the courts—this Court should declare it unconstitutional because it is not justified by any compelling state interest.

In any event, § 1516(d) cannot survive scrutiny under the "lesser" equal protection standard of "some rationality in the nature of the class singled-out" (*James v. Strange* (1972), 407 U.S. 128, 140, 32 L.Ed.2d 600, 610). An after the fact rationalization cannot be created to support the constitutionality of § 1516(d) (*McGinnis v. Royster* (1973), 410 U.S. 263, 35 L.Ed. 2d 282). Rather, the challenged statute must be considered in the light of whether it rationally furthers some articulated state purpose (410 U.S. at 270, 35 L.Ed. at 289). In 1974 Congress amended § 1516(c) and enacted § 1516(d) for the express purpose of giving American manufacturers the same right to judicial review of adverse countervailing duty determinations of the Secretary of the Treasury as American importers previously had, thus overturning *United States v. Hammond Lead Products, Inc.* (1971), 58 CCPA 129, C.A.D. 1017, 440 F.2d 1024, *cert. den.*, 404

U.S. 1005 (See S.Rep. No. 93-1298, 93d Cong. 2d Sess. (1974), 4 U.S. Code Cong. and Admin. News at 7320. Cong. Rep. No. 93-1644, 93 Cong. 2d Sess. (1974), 4 U.S. Code Cong. & Admin. News at 7389). However, there is no need to exclude American importers from § 1516(d) proceedings to achieve this goal. Implicit Congressional recognition of this point is evidenced by § 1516(c), where all interested parties are litigants in proceedings brought by American manufacturers. Indeed, the government's legitimate interest in avoiding piecemeal litigation and economizing on the use of scarce judicial resources militates in favor of participation by the affected American importers in § 1516(d) proceedings, not against it. Furthermore, striking down § 1516(d) as unconstitutional will not deprive American manufacturers of the right to judicial review because they will still be entitled to such review pursuant to § 1516(c).

Where governmental action trenches upon fundamental constitutional rights, the government is required to use the least drastic alternative or means available. *Dean Milk Co. v. City of Madison* (1951), 340 U.S. 349, 354, 95 L.Ed. 329, 333, *United States v. Jackson* (1968), 390 U.S. 570, 583, 20 L.Ed.2d 138, 147, and *United States v. Robel* (1967), 389 U.S. 258, 268, 19 L.Ed.2d 508, 516-517. Section 1516(c) proves that Section 1516(d) is not the least restrictive alternative for achieving Congress' goal of providing a forum for American manufacturers to contest negative determinations of the Secretary of the Treasury.

Conclusion.

Congress has unconstitutionally (presumably inadvertently) discriminated against importers and in favor of their competitors, American manufacturers, in the enactment of § 1516(d). To provide access to the courts for the vindication of one side's interests in a dispute while excluding from participation opposing interests most directly affected by the outcome, is blatant and invidious discrimination. *Amici* cannot intervene in the Section 1516(d) proceedings because there is no provision in the law or in the Rules of the Customs Court for intervention, nor may such a provision be implied on the basis of Federal Rule of Civil Procedure 24 (*Airco, Inc. v. U.S.* (unpublished order of U.S. Customs Court dated December 12, 1977, Civ. No. 76-3-00643, in which, revealingly, the Justice Department successfully opposed intervention by the importer).

This Court has recognized the extreme importance of the substantive issues raised by this litigation by establishing an expedited schedule for this case. However, irrespective of the importance of these substantive questions, it would be a disservice to all concerned to render a decision regarding countervailing duties which cannot be binding upon those who must pay the duties because they have been deprived of the fundamental right under the due process and equal protection clauses to participate in the judicial proceedings leading to this decision. The confusion and uncertainty, perhaps chaos, which would result from such a decision in a defective proceeding would be satisfying to no one

and would not put the issue to rest. *Amici* would, of course, be severely prejudiced in attempting to argue against the imposition of countervailing duties with respect to their products, even in this Court, if the merits had already been decided.

It is submitted that this Court's only recourse is to dismiss the instant proceedings on the ground of Section 1516(d)'s unconstitutionality and allow this dispute to arise in a context in which all interested parties are allowed to participate.

Respectfully submitted,

MARJORIE M. SHOSTAK,
S. RICHARD SHOSTAK,
and
THEODORE B. OLSON,
Attorneys for Amici Curiae.

Of Counsel:
JAMES F. O'HARA,
STEIN, SHOSTAK, SHOSTAK & O'HARA, INC.,

REX S. HEINKE,
GIBSON, DUNN & CRUTCHER.

April 1978

Supreme Court, U. S.
FILED
APR 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITIONER'S OBJECTION TO THE MOTION OF CRAIG CORPORATION, SUPERSCOPE, INC., MARANTZ COMPANY, INC., AKAI AMERICA, LTD., CLARION CORP. OF AMERICA, J.L.L. CORP. OF AMERICA, INC., KENWOOD ELECTRONICS, INC., PIONEER ELECTRONICS OF AMERICA, SANYO ELECTRIC, INC., KRACO ENTERPRISES, INC., ASSOCIATION OF ELECTRONIC IMPORTERS, AND FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

April 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

PETITIONER'S OBJECTION TO THE MOTION OF CRAIG CORPORATION, SUPERSCOPE, INC., MARANTZ COMPANY, INC., AKAI AMERICA, LTD., CLARION CORP. OF AMERICA, J.I.L. CORP. OF AMERICA, INC., KENWOOD ELECTRONICS, INC., PIONEER ELECTRONICS OF AMERICA, SANYO ELECTRIC, INC., KRACO ENTERPRISES, INC., ASSOCIATION OF ELECTRONIC IMPORTERS, AND FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Craig Corporation, Et Al., (hereinafter "applicants") seek leave to file an *amici curiae* brief not in support of either party's position on any of the questions with respect to which this Court has granted certiorari. Rather, the applicants would argue that

the case should be dismissed on the grounds that the underlying statute which petitioner invoked to obtain judicial review, 19 U.S.C. § 1516(d), is unconstitutional.

Petitioner objects to the motion and respectfully urges that it be denied. At no time during the two publicized Court proceedings below did any of the applicants attempt to appear as *amicus* either to argue the alleged constitutional infirmity or any other matter. Further, none of them attempted to intervene.* Had they proceeded as the applicant for intervention had done in *Airco, Inc.* v. *United States*, Cust. Ct. No. 76-3-00643, they could have placed squarely before the Customs Court the very issue they now seek to place before this Court. Instead, the present applicants have chosen to play a waiting game, while the parties and the Courts have made substantial expenditures of time, effort, and resources in dealing with the substantive issues of the litigation; now, at the eleventh hour, applicants ask permission to have this Court consider their argument that all the litigational effort has been for naught. We submit that that request should be denied.

Finally, we cannot help but observe that the applicants' claim of unconstitutionality is on its face so totally lacking in merit that their motion could be denied on that ground alone. Applicants contend that 19 U.S.C. § 1516(d) is unconstitutional because they, as importers, are left out of such proceedings, whereas, they say, 19 U.S.C. § 1516(c) passes constitutional muster because it permits importers to participate. However, had petitioner invoked 19 U.S.C. § 1516(c), there would have been no more than a remote possibility that any of the applicants would have become a party, since the importer/party-in-interest in a 19 U.S.C. § 1516(c) proceeding is, in effect, selected at random (and may not even have any real interest in actively participating in the litigation). *See* 19 U.S.C. § 1516(c) and (f). Had such proceeding been initiated, the applicants probably would have had to wait in the wings while the litigation was being conducted. Indeed, with respect to most every action tried in the Customs Court, there are importers of the same kind of merchandise the subject of the litigation who are not parties in the particular litigation. This is the

---

* Applicants cite an unpublished order of the Customs Court, dated December 12, 1977 (entered on December 14, 1977), in *Airco, Inc.* v. *United States*, Customs Court No. 76-3-00643, for the proposition that no intervention is permitted in a 19 U.S.C. § 1516(d) proceeding. This reference is inaccurate and misleading.

In *Airco*, a purported importer/consignee moved to intervene in a 19 U.S.C. § 1516(d) proceeding, claiming that it had a statutory and constitutional right to intervene. Both the American manufacturer/plaintiff and the Government/defendant opposed the motion, arguing that in addition to there being no statutory or constitutional right of intervention, the applicant for intervention had not even demonstrated that it was the importer/consignee which it claimed to be. [Other arguments were also advanced by the parties in opposition to the motion.] While the Customs Court entered an order denying the applicant's motion, no explanation was given for the denial, and contrary to the assertion of the applicants herein, it is not known whether the Customs Court determined that there was no right to intervene in 19 U.S.C. § 1516(d) proceedings.

Subsequently, the applicant in *Airco* filed a motion for rehearing in the Customs Court, (1) rearguing that it is an importer/consignee and (2) developing the argument that to hold that it has no right to intervene would render 19 U.S.C. § 1516(d) unconstitutional. Again, both parties in *Airco* joined issue with the applicant for intervention on all points, and again, on February 28, 1978, the Customs Court entered an order denying the motion without indicating its views on the statutory and constitutional questions raised.

very nature of Customs Court litigation, as this Court has recognized. *United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927). An "interested" non-party who is displeased with the outcome of Customs Court litigation, is then free, and often elects, to relitigate—to "improve the record" or to reargue the law. *See Stone & Downer.*

WHEREFORE, for the reasons stated, the applicants' motion to file an *amici curiae* brief should be denied.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

April 1978

RECEIVED
APR 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

OBJECTION OF THE UNITED STATES TO THE MOTION OF CRAIG CORPORATION, ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The United States did not consent to the filing of the brief of Craig Corporation, et al., as amici curiae. Because amici suggest that this action is "symptomatic" of either hostility or some other improper reason (Br. 2-3, 13-14), we file this objection to state the reasons why the United States did not consent. See Rule 42(3) of the Rules of this Court.

Amici contend that the procedures for judicial review of decisions not to assess countervailing duties are unconstitutional because they do not afford notice and an opportunity for a hearing to all persons who might be affected by the decisions. This contention has not been made by any party to the case and was not presented in the petition for a writ of certiorari. It therefore is not open now. See Rules 40(2) and 42(5) of the Rules of this Court. See also, e.g., Quilloin v. Walcott, No. 76-6372, decided January 10, 1978, slip

op. 7 n. 13; Dothard v. Rawlinson, 433 U.S. 321, 323 n. 1. We declined to consent to the filing of the brief by amici because the issue had not been raised at any earlier point in the litigation and because we would be unable to respond to any arguments amici might make.

Nothing in the procedures for judicial review of countervailing duty cases is so unfair to amici that this Court should now consider the arguments they advance. It is commonplace that the outcome of litigation may influence the rights of numerous persons because of the dostrine of stare decisis. But the existence of potentially widespread consequences does not require that all potentially affected persons be given notice and a separate hearing -- it does not require, in other words, that every case be treated as a class action under Fed. R. Civ. P. 23(b)(1). Persons ordinarily may seek to protect their interests by intervening (see Fed. R. Civ. P. 24) or by appearing as amici curiae to make any arguments that the parties may neglect.

The civil rules do not govern proceedings in the Customs Court, and that court has held that intervention is not allowed as of right. But if there is any flaw of constitutional magnitude in the procedures for the determination of customs duties (and we do not think that there is), it is in the rule against intervention, not in 19 U.S.C. (Supp. V) 1516. Amici could have attempted to intervene in the Customs Court. If intervention had been granted, they would have been able to make any appropriate arguments concerning the proper construction of the countervailing duty statute. And if intervention had been denied, they could have appealed, arguing that the denial of intervention deprived them of a right to a judicial hearing. Moreover, they could have appeared as amici curiae in the Customs Court and the Court of Customs and Patent Appeals and made both their substantive arguments and their objections to the procedure under

Section 1516. Amici did not seek to intervene, however, and they did not appear as amici curiae in the lower courts. We believe that it is now too late for them to raise constitutional objections to Section 1516.

It is therefore respectfully submitted that the motion for leave to file a brief as amici curiae should be denied.

WADE H. McCREE, JR.,
Solicitor General.

APRIL 1978.

MOTION FILED
MAR 23 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

ROBERT E. HERZSTEIN
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

Of Counsel:

H. R. NOLTE, JR.
Vice President—General Counsel
M. S. EVELEV
Ford Motor Company
Dearborn, Michigan 48121

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

March, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

Pursuant to Supreme Court Rule 42(3), Ford Motor Company hereby respectfully moves for leave to file the attached brief as amicus curiae urging that the judgment below be vacated and the case remanded for full consideration of the facts. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner has not consented.

The interest of amicus is as follows:

Ford Motor Company is an international business organization engaged principally in the manufacture, assembly and sale of cars and trucks and related parts and accessories. In the United States, Ford ranks second in the industry in factory sales of cars and of trucks. Ford and its subsidiaries manufacture or assemble in over twenty countries, and Ford products are sold in over 150 countries and territories. Ford also exports cars and trucks and component parts to and from the United States in substantial quantities. Currently, in addition to its trade with Canada in vehicles and parts under the Automotive Free Trade Agreement, it imports certain cars from Europe, light commercial vehicles from Japan, and components and materials from many nations throughout the world.

As the issue in this case has been presented in the courts, the result could be a broad holding that the remission of all indirect taxes constitutes a "bounty or grant," without regard to certain important differences in the tax systems of different nations. Though this case was occasioned by a remission of the Japanese Commodity Tax, the broad ruling discussed by the lower courts and the parties would also implicate the value-added tax systems of various European countries and the federal Manufacturers Sales Tax in Canada. Virtually every export from Europe and Canada to the United States would thus be potentially subject to countervailing duties in the United States.

This development would substantially increase the cost of Ford's imports. In addition, such a broad application of U.S. countervailing duties could bring forth retaliation, uncertainty, and instability in the general flow of trade throughout the world. Such a development

would have an extremely harmful effect on Ford's business, which is heavily dependent upon the ability to import and export products between various countries readily, with clearly defined costs, and on a continuing and predictable basis.

As a company that competes in the U.S. market with imported products, Ford also has an interest in the effective application of countervailing duties when such duties are warranted by incentives granted in the exporting countries. Thus Ford's overall interest is in the careful application of the countervailing duty law to achieve the purpose of that law while avoiding overly broad applications that could have an unnecessary and disruptive impact on U.S. international trade.

Amicus has examined the issues presented in this case from its perspective as a company with strong interests both in an open system of international trade and in fair competition between goods manufactured in the United States and those imported from abroad. Amicus believes that the complexities of national taxation systems and their effect upon the system of international trade are such as to require a careful factual inquiry by the United States before a determination is made whether a tax remission constitutes a "bounty or grant." Only such a careful examination into the economic effects of tax remissions will permit determinations that achieve the statutory objective of fair competition, without unfairly imposing additional duties on a wide range of imports not covered by the statute.

Amicus is particularly concerned that no such examination was made in this case, and that the briefs previously filed by both parties have presented the issue in broad terms, without reference to the particular facts of

the Japanese Commodity Tax Law, and as though all foreign indirect taxation systems operate in the same way and have the same effect on imports into the United States. Amicus presents reasons and authorities indicating that different foreign indirect tax remission systems may have different impacts on exports to the United States. Amicus urges a remand or certain alternative dispositions of this case—all different from those thus far urged by either party—which would call for examination of the operation and effect of a foreign tax system before countervailing duty determinations are made. Accordingly, Amicus requests that this Court grant leave to file the attached brief.

Respectfully submitted,

ROBERT E. HERZSTEIN
Attorney for Amicus Curiae

Of Counsel

H.R. NOLTE, JR.
M.S. EVELEV

ARNOLD & PORTER

TABLE OF CONTENTS

PAGE

Statute Involved 1
Questions Presented 2
Statement 3
Summary of Argument 6
ARGUMENT
I. The Court Should Remand This Case For Consideration of Whether the Rebate of Japanese Commodity Taxes Provides an Incentive For the Export of Japanese Products to the United States 9
A. Neither the Treasury Nor the Courts Below Evidenced Any Consideration of the Actual Effects of the Japanese Rebates of Commodity Taxes 13
1. The Department of the Treasury.. 13
2. The United States Customs Court 14
3. The United States Court of Customs and Patent Appeals 15
B. The Principle For Determining Whether a Tax Rebate Constitutes a "Bounty or Grant" Should be Whether That Rebate Encourages Exports 15
1. The Starting Point For Analysis is the Recognition That a Remission of Taxes on Exports Might Operate as an Incentive to Exports 16
2. When an Indirect Tax Covers All or Most of a Country's Products, Adjustments to Exchange Rates and Wage Rates Will Negate the Advantage That Might Accrue to Export Sales..... 18
3. When an Indirect Tax Is Selective, the Rebate Upon Export Does Promote Exports 21

PAGE

C. Inquiry Into the Operation and Effect of Foreign Tax Remissions is Entirely Feasible and is Consistent With This Court's Prior Decisions Under The Act 23

II. If This Court Enters Judgment For Zenith, It Should Do So on the Basis of the Facts Peculiar to the Japanese Tax Involved in This Case 26

A. The Japanese Commodity Tax Law is a Selective Indirect Tax That Confers a Competitive Advantage on Exports 27

B. A Narrow Holding is Necessary if the Purpose of the Countervailing Duty Statute is to be Respected 28

C. A Narrow Holding is Further Compelled by the Unique Circumstances of Long-Standing Reliance on Established Administrative Practice 29

III. If This Court Affirms the Decision of the Court of Customs and Patent Appeals, Its Decision Should Not Preclude Later Determinations That Rebates of Specific Indirect Taxes Are Bounties or Grants 30

CONCLUSION 32

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES: PAGE

American Express Co. v. *United States*, 472 F.2d 1050 (C.C.P.A. 1973) 10

Apex Hosiery v. *Leader*, 310 U.S. 489 (1940) 12

Downs v. *United States*, 187 U.S. 496 (1903) 8,17,20 24,25

Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 (1969) 13

Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) 8,25

Norfolk Monument Co., Inc. v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969) 13

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) 13

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 12

Walter Holm & Company v. *Hardin*, 145 U.S. App. D.C. 347, 449 F.2d 1009 (1971) 16

ADMINISTRATIVE DECISIONS

Electrical Transmission Towers from Italy, T.D. 67-102 10

Leather Handbags from Uruguay, T.D. 78-33 10

X-Radial Steel Belted Tires from Canada, T.D. 73-10 11

STATUTES

Sherman Act, 15 U.S.C. §§ 1 et seq. 12,13

Trade Act of 1974, P.L. 93-618 3,14

19 U.S.C. § 1303 1,3

19 U.S.C. § 1516 4

PAGE

MISCELLANEOUS

P. Areeda, Antitrust Analysis (2d ed. 1973)..... 12

R. Baldwin, Nontariff Distortions of International Trade (1970) 20,22

Business International Corp., Investing, Licensing and Trading Conditions Abroad —France (1977) 19

Council on Wage and Price Stability, Report to the President on Prices and Costs in the United States Steel Industry (1977)..... 20,22

K. Dam, The GATT—Law and International Economic Development (1970) 18

Executive Branch GATT Studies, No. 1, "Tax Adjustments in International Trade: GATT Provisions and EEC Practices," U.S. Sen. Comm. on Finance, 93d Cong., 2d Sess. (Compilation of 1973 Studies Prepared by the Executive Branch: Comm. Print 1974).... 17

Federal Trade Commission, Staff Report on the U.S. Steel Industry and its International Rivals (1977) 20

T. Hayashi, Guide to Japanese Taxes (1977)... 22

J. Jackson, Legal Problems of International Economic Relations (1977)..... 10

Marks & Malmgren, Negotiating Nontariff Distortions to Trade, 7 Law & Pol. Int'l Bus. 327 (1975)..... 10,18,25

J. Meade, The Balance of Payments (1951)..... 20

Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries (1968)..... 19,25,30

PAGE

Organisation for Economic Cooperation and Development, Revenue Statistics of OECD Member Countries, 1965-1975 (1977) 25

Rosendahl, Border Tax Adjustments: Problems and Proposals, 2 Law & Pol. Int'l Bus. 85 (1970)..... 18

U.S. Dept. of Commerce, United States Trade with Major Trading Partners, 1969-75 (1976)..... 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF OF FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF REMAND

Statute Involved

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303(a)(1) (Supp. V 1975) provides:

> "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel,

or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Questions Presented

1. Whether the Department of Treasury should be required to conduct a factual examination and make reasoned findings concerning the operation and effect of tax remissions under a foreign tax law before determining that such remissions do, or do not, constitute a "bounty or grant" subject to countervailing duties in the United States?

2. Whether any decision affirming or reversing the judgment of the court below should carefully distinguish the selective Japanese Commodity Tax there involved from general and nonselective taxes such as the European value-added tax and the Canadian federal Manufacturers Sales Tax?

Statement

The first general Countervailing Duty Statute was enacted in 1897.[1] Its purpose was to offset the competitive advantage that foreign products would have in the U.S. market when they are exported from a foreign country with the benefit of a subsidy. The statute seeks this objective by directing the Secretary of the Treasury to levy a countervailing duty on imported products equal to the "bounty or grant" bestowed on the goods abroad.

For many years the Department of the Treasury has refused to impose countervailing duties on products which, on export from their country of origin, had benefited from the rebate[2] of sales or excise taxes, because the Secretary did not consider the rebate of these "indirect" taxes to be a "bounty or grant" under the Countervailing Duty Statute.[3] Because of statutory technicalities peculiar to customs law, however, a determination by the Treasury not to impose countervailing duties could not be challenged in court. Thus domestic producers who complained about competing imports which benefited from foreign rebates of "indirect" taxes were unable to obtain judicial review of the Department's denial of their petitions for relief. In the Trade Act of 1974, Congress provided for judicial review of the Secretary's negative

[1] 30 STAT. 205. The statute has been reenacted in substantially unchanged form several times. At present it is Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V. 1975).

[2] "Rebate" as used herein indicates any remission, exemption, or forgiveness of any tax that would have been collected but for export of the product.

[3] The Government stated that the first announcement of this practice by the Treasury was in 1898, less than a year after passage of the statute. Brief of the United States in Opposition to Petition for Certiorari 5.

countervailing duty determinations.[4] This case presents the first major instance of judicial review of a Treasury determination that a foreign nation's rebate of "indirect" taxes does not constitute a "bounty or grant" within the meaning of the law. The results of the case can have a major impact on the international trading system.

The parties and the courts below have treated this case as an abstract question of law. Opposite extremes have been urged by the two parties and adopted by the two lower courts. Petitioner Zenith has relied upon decisions 60 and 70 years old in arguing that the forgiveness of "indirect" taxes upon exportation to the United States constitutes the bestowal of a bounty or grant.[5] The United States Customs Court accepted this argument and concluded in broad terms that "the Japanese Commodity Tax involves the remission of an indirect tax and, as such, is countervailable under section 1303." *Zenith Radio Corporation* v. *United States,* C.D. 4691, 430 F. Supp. 242 (1977). On the other hand, respondent the United States has argued that *no* remission of, or exemption from, an indirect tax constitutes a bounty or grant under the Countervailing Duty Statute unless the remission exceeds the original tax imposed.[6] The United States Court of Customs and Patent Appeals, in turn, affirmed this position. *United States* v. *Zenith Radio Corporation,* C.A.D. 1195, 562 F.2d 1209 (1977).

In essence, each party to the controversy has urged a *"per se"* rule; at no stage of these proceedings have there

[4] P.L. 93-618 § 331(b), (c), 88 STAT. 2052, *revising* Section 516 of the Tariff Act of 1930 (19 U.S.C. 1516 (Supp. V 1975)).

[5] *See* Zenith's Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals 3-4.

[6] Brief for United States in the United States Court of Customs and Patent Appeals 7. Brief for United States in Opposition to Petition for Certiorari 8, 11-12.

been developed facts pertaining either to the operation and effect of "indirect" taxes in general, or to the Japanese Commodity Tax Law in particular.

The polar positions of the parties and the absence of a developed factual record place this Court in the position of choosing between two unsatisfactory resolutions of the case. First, this Court might approve the decision of the Department of the Treasury despite the absence of findings of fact and a reasoned analysis relating such findings to the governing statute. Such a course would have the effect of precluding the application of the statute to any remission of indirect taxes, and would frustrate the evident purpose of the Countervailing Duty Statute. Alternatively, this Court could approve the position urged by Zenith and adopted by the Customs Court—also in the absence of findings of fact and reasoned analysis relating the findings to the statute. That course would upset a long-established administrative practice, which has inevitably engendered widespread reliance by both businesses and governments in the world's major trading nations.

Amicus believes the broad rule urged by Zenith would have a highly disruptive impact on international trade. It would also be harmful to the economic and political position of the United States, as well as to companies such as Amicus which depend on the orderly and open flow of international trade. Thus Amicus opposes reversal and reinstatement of the judgment of the Customs Court, as urged by Zenith. On the other hand, it does not appear necessary, as urged by the respondent, to preclude the operation of the Countervailing Duty Statute to any and all remissions of foreign indirect taxes, without factual inquiry into their operation and effect. Such a ruling would be inconsistent with both the language and

the purpose of the Statute. Thus Amicus also opposes affirmance of the Court of Customs and Patent Appeals, as proposed by respondent.

Amicus urges instead that the case be remanded so that the Department of the Treasury may examine the operation and effect of the Japanese Commodity Tax Law and make a fresh determination whether tax remissions under that law constitute a "bounty or grant." In particular, it is the position of Amicus that the Treasury Department should distinguish between rebates of selective indirect taxes, imposed on only a few products in the exporting country, and rebates of general indirect taxes imposed evenly on virtually all products. If the case is not remanded, Amicus urges that the Court refrain from adopting either of the polar positions of the parties, and make clear that future determinations under the Countervailing Duty Law must be made after an examination of the economic effects of the specific indirect tax remission then in question.

Summary of Argument

Section 303 of the Tariff Act of 1930 requires the Department of the Treasury to impose a countervailing duty on imports into the United States which benefit from a "bounty or grant" from the exporting country. However, that statute does not define the term "bounty or grant." The phrase must be interpreted by referring to the purpose of the statute, which is to offset foreign practices that ~~and~~ provide an incentive to export products to the United States rather than sell them in the home market.

Throughout this litigation, the parties and the courts below have framed the issues in all-inclusive terms—disputing whether the remission upon export of an indirect

tax does, or does not, constitute a "bounty or grant." Each party has argued, in effect, for a *per se* rule which, would either make all such remissions a "bounty or grant," or none of them. But in order to determine whether a foreign practice falls within the category of evils which Congress sought to remedy, it is necessary to examine the operation and economic effects of the practice in question. In this case, there is no evidence that the Department of the Treasury, Zenith, or the courts below have studied the operation and effect of the Japanese Commodity Tax Law. The Treasury Department simply issued a conclusory determination that "no bounty or grant is being paid" on the products in question. The Customs Court granted summary judgment for Zenith on the basis of no facts other than a two-sentence description of the Japanese Commodity Tax Law. The Court of Customs and Patent Appeals reversed and entered summary judgment for the United States on the ground that the Secretary of the Treasury has "presumably" made a determination concerning the economic results of the Japanese tax remission.

This Court should remand the case for a careful consideration of how the Japanese Commodity Tax Law affects the export of products to the United States. The Department of the Treasury and the courts below can then carry out their responsibilities under the statute by determining whether rebates of the Japanese Commodity Tax provide an economic incentive to export goods rather than sell them in Japan, and thereby distort trade.

Amicus urges, in short, that decisions in this and other countervailing duty cases take account of the peculiarities and differing effects of the indirect tax systems of various countries. One important difference is that the Japanese Commodity Tax applies only to selected products, where-

as the indirect taxes levied by many other countries (including the European Community and Canada) are of general application. This distinction is important because rebates of general indirect taxes are offset by changes in the exchange rate and wage rates in the taxing country. Thus remission of a general indirect tax tends not to provide an incentive to export. On the other hand, a selective indirect tax, such as that of Japan, creates a continuing incentive to export items on which the tax is rebated, and thus distorts normal trading patterns.

The careful examination of the Japanese tax which Amicus urges would not be inconsistent with this Court's prior decisions under the Countervailing Duty Statute. Indeed, the *Downs* and *Nicholas* decisions of this Court, which have occasioned so much discussion throughout these proceedings, represent cases in which the Court carefully considered the facts of individual tax rebates on individual commodities. Moreover, the Department of the Treasury is capable of undertaking such an analysis, which is similar in scope to those which it performs in other contexts.

If this Court declines to remand the case and instead reaches a decision on the merits, the Court should refrain from adopting either of the prior positions of the parties. If the Court decides that the rebate is a bounty or grant, it should limit the scope of its ruling to selective taxes like the Japanese Commodity Tax, and should avoid implicating indirect taxes of other nations which are of general applicability. As indicated previously, a selective tax provides an incentive to export; a general one is offset by other economic adjustments and provides no enduring incentive. In addition, the selective indirect tax used in Japan is but a minor part of its entire tax structure, whereas many European nations have instituted indirect

taxes that provide sizable portions of total governmental revenues, at a time when the Treasury did not consider indirect tax remission to be a "bounty or grant". Thus, a broad holding that all rebates of indirect taxes constitute a "bounty or grant" is not only unnecessary, but it would also have profound implications for the international trade and domestic tax structures of many European nations and Canada.

Finally, if this Court decides that the Japanese Commodity Tax Law does not constitute a bounty or grant, it should do so in a manner that does not preclude later determinations by the Treasury Department, based on an examination of economic effects, that certain rebates of indirect taxes *are* countervailable under Section 303.

ARGUMENT

I. The Court Should Remand This Case For Consideration Of Whether The Rebate Of Japanese Commodity Taxes Provides An Incentive For The Export Of Japanese Products To The United States.

Section 303 of the Tariff Act of 1930, as amended, which authorizes the imposition of countervailing duties by the Secretary of the Treasury, is framed in very broad terms: these duties are to be levied whenever any "bounty or grant" is paid upon the manufacture, production or export of any article. The statute contains no definition of "bounty or grant." The meaning and boundaries of this phrase must be sought by looking to the purpose of the statute.

The purpose is to offset, by means of an additional import duty, foreign payments or benefits which provide an incentive to export products to the U.S. marketplace

and which are therefore likely to distort the flow of trade according to principles of comparative advantage. By this method the statute seeks to preserve fair competition in the United States between foreign exports and products manufactured in the United States.[7]

Foreign benefits which can provide an incentive to export rather than sell in the home market can, quite obviously, take a wide variety of forms. The foreign government can make outright cash payments to its manufacturers based on quantities exported; it can relieve the exporter of taxes or other burdens that would otherwise be imposed;[8] or it can supply services, financing, or other governmental benefits in a fashion which is keyed to export activities.[9] However, governmental benefits to a company or industry which are both of general assistance and do not have the effect of providing an inducement for

[7] For a brief description of the scope and operation of the Countervailing Duty Statute, see J. Jackson, Legal Problems of International Economic Relations §§ 12.3(A), 12.3(C) (1977); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 343-67 (1975). By our summary description of the purpose of the Statute, we do not mean to set forth the definitive test to be applied in making determinations under the Act following proper examination of the effects of a specific indirect tax remission scheme. That test is not in controversy at this time, the only question here being whether such remissions are always, or never, covered by the Statute. We refer to the test hereafter in shorthand fashion as "creating an incentive to export," though as the discussion indicates the test might have to be more complex in some situations to distinguish between benefits that do and do not involve the evils at which Congress aimed in enacting the Statute.

[8] *See, e.g.*, Electrical Transmission Towers from Italy, T.D. 67-102, *aff'd*, American Express Co. v. United States, 472 F.2d 1050 (C.C.P.A. 1973). Upon the exportation of transmission towers, the government of Italy rebated internal charges and taxes such as stamp, transportation, insurance and mortgage taxes.

[9] *See, e.g.*, Leather Handbags from Uruguay, T.D. 78-33 (preferential financing for exports).

exports must be set to one side, because it does not appear that they fall within the purpose of the statute. Subsidies for general manufacturing activity, tax remissions based on plant location or employment conditions, general government financial assistance to an industry, and similar benefits may be neutral in their effect on exports as compared with sales in the home market, or may benefit exports disproportionately, depending on a variety of circumstances.[10]

Whether a given governmental benefit creates an inducement for exports can also depend on the conditions prevailing in international trade. In some circumstances, as will be illustrated below, the effect on exports of a benefit granted by one government may be neutralized by economic adjustments that take place in the international trading system.

Because of the complex and changing nature of the practices which the Countervailing Duty Statute regulates, it is not realistic to seek a precise and enduring definition of the phrase "bounty or grant" which will permit facile determinations in cases involving novel facts. Some government benefits which appear neutral on their face

[10] In X-Radial Steel Belted Tires from Canada, T.D. 73-10, 38 Fed. Reg. 1018 (January 8, 1973), for example, the Department of the Treasury imposed countervailing duties against imports of tires produced in plants to which the Government of Canada and the Province of Nova Scotia had allowed accelerated depreciation, low-interest loans, and certain property tax concessions. Although these programs seemed to benefit equally products destined for domestic and foreign consumption, the Treasury Department determined that, because of the size of the specific manufacturing facilities there involved and the relative size of the home market, a "substantial majority" of the tires produced were intended for export to the U.S. Thus, based on a factual examination of the operation and effects of the specific program in question, the apparently neutral benefits were considered to be bounties upon export.

may in fact create an inducement for exports; others which appear to create such an inducement may in fact not do so when examined in practice. The 1897 statute is one which must be interpreted as a broad statement of purpose designed to cover a variety of fact situations which are too complex for a legislature to cope with individually, and which will inevitably evolve with changing economic conditions. Like the Sherman Act, it can only be implemented by examining the operation and economic effects of actions in individual cases.[11]

Because of the complexities of international trade, determinations under Section 303 require examination of several factors: the manner in which the foreign practice alleged to be a "bounty or grant" actually operates; the economic effects of this practice; and the extent to which the practice is offset by "adjustment mechanisms" in the economy such as floating exchange rates.

[11] *See, e.g.*, these Sherman Act cases: United States v. Columbia Steel Co., 334 U.S. 495, 526 (1948) ("The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed"); Apex Hosiery v. Leader, 310 U.S. 469, 489 (1940) ("The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed.") *Cf.* P. Areeda, Antitrust Analysis 46 (2d ed. 1973): "Thus, the Sherman Act may be seen not as a prohibition of any specific conduct but as a general authority to do what common law courts usually do: to use certain customary techniques of judicial reasoning, to consider the reasoning and results of other common law courts, and to develop, refine, and innovate in the dynamic common law tradition."

A. *Neither the Treasury nor the Courts Below Evidenced Any Consideration of the Actual Effects of the Japanese Rebates of Commodity Taxes.*

In the context of suits instituted under the Sherman Act, this Court has expressed its disapproval of the use of summary judgment in cases presenting complicated economic issues.[12] Despite the need for an economic analysis to determine whether the Japanese Commodity Tax Law provides an incentive to export, the Department of the Treasury simply issued a conclusory determination, and both lower courts granted motions for summary judgment.

1. **The Department of the Treasury.** In considering petitioner Zenith's allegation that the Government of Japan was, directly or indirectly, paying or bestowing grants or bounties upon the manufacture, production or exportation of certain consumer electronic products, the Office of the Secretary of the Treasury issued a Notice of Preliminary Determination,[13] an amendment to this Notice of Preliminary Determination,[14] and a Final Negative Countervailing Duty Determination.[15] These notices did not mention the Japanese Commodity Tax and forgiveness therefrom for exports, nor do they explain why this forgiveness does not constitute a "bounty or grant." The Final Negative Countervailing Duty Determination merely concluded in general terms that "no bounty or grant is being paid or bestowed, directly or indirectly . . . upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."[16]

[12] *See, e.g.*, Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

[13] 40 Fed. Reg. 5378 (February 5, 1975).

[14] 40 Fed. Reg. 19853 (May 7, 1975).

[15] 41 Fed. Reg. 1298 (January 7, 1976).

[16] 41 Fed. Reg. at 1298.

In describing the Secretary's determination, the Court of Customs and Patent Appeals acknowledged that "the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax." 562 F.2d at 1216. The court nonetheless stated that the "Secretary has *presumably* determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." *Id.* (emphasis added). Such a presumption is no substitute for a statement of reasons for the determination from the Secretary.[17] Absent such a statement, the judiciary will be unable to evaluate the reasonableness of the Secretary's exercise of administrative discretion.[18]

2. **The United States Customs Court.** Despite the silence of the Department of the Treasury on this issue, the United States Customs Court granted Zenith's motion for summary judgment. In so doing, the Customs Court noted that the "essential facts of the controversy are not in dispute." 430 F. Supp. at 242. Yet the only facts recited by the court were those recounting the proceedings in the case and a two-sentence description of the Japanese

[17] In Section 331(b) and 331(c) of the Trade Act of 1974, Congress provided for the judicial review of the Secretary's decision not to impose countervailing duties. If this provision for review is to have any meaning, the judiciary must have a *basis* upon which it can assess the reasonableness of the Secretary's decisions.

[18] The dissent in the Court of Customs and Patent Appeals emphasized that "there was no determination of economic result by the Secretary with respect to the Japanese Commodity Tax—not even a *de minimis* determination." 562 F.2d at 1223, 1225 (Miller, J., dissenting). The dissent also suggested remand "if the majority remains convinced that the economic result of the remission of the Japanese Commodity Tax is decisive of the issue before us." 562 F.2d at 1225, n.6.

Commodity Tax Law. Needless to say, the court did not consider the actual operation and effects of the tax and the rebates.[19]

3. **The United States Court of Customs and Patent Appeals.** In reversing the Customs Court and ordering entry of summary judgment for the United States, the Court of Customs and Patent Appeals also failed to analyze the details of the Japanese scheme. In addition to its unsupported "presumption" that the Secretary had determined the economic effect of the rebate at the border, the majority framed the issue before it in overly broad terms, declaring that the "dispositive issue is whether the mere remission of an excise tax must, as a matter of law, be deemed a bounty or grant under [the statute]." 562 F.2d at 1212 (fn. omitted). The actual issue facing the court was whether remission of the *Japanese commodity tax* must be deemed a bounty or grant, not whether remission of *any* indirect tax must be so considered as a matter of law.

B. *The Principle for Determining whether a Tax Rebate Constitutes a "Bounty or Grant" Should Be Whether That Rebate Encourages Exports.*

In remanding for further consideration of whether the Japanese Commodity Tax Law is a bounty or grant, this Court should instruct the Treasury and the lower courts to examine whether the scheme actually encourages exports of products on which the tax rebates are granted, in

[19] Newman, J., concurring, addressed this issue briefly, but felt that no triable issue existed, because, as a matter of law, "when exports are relieved of a domestic consumption tax burden which would otherwise be imposed if the goods were sold in the home market, a bounty or grant, as these terms were construed in *Downs* and *Nicholas*, is bestowed on the exporter." 430 F. Supp. at 249, 258.

preference to sale of such products in the home market.[20] Thus, their determination will not rest on a distinction between rebates of direct and indirect taxes, but on the effects of the particular rebate program. In making this determination, the Treasury and the lower courts should consider the basic difference in economic effect between selective indirect taxes on the one hand and general and uniform indirect taxes on the other, as described below.

This inquiry into the effects of any particular tax and rebate program would not dramatically increase the burden of enforcing the statute, because the inquiry need not be made *ab initio* in every case. Once a particular tax program has been the subject of an investigation under the Countervailing Duty Statute, the facts and analysis developed therein can be utilized in subsequent cases involving the same program. At a minimum, though, all tax and rebate programs which have significantly different features or effects from those previously examined should be the objects of separate study.[21]

1. The Starting Point for Analysis Is the Recognition That a Remission of Taxes on Exports Might Operate As an Incentive to Exports.

In view of the broad language of Section 303, it is reasonable to assume, as a starting point for an analysis of whether a foreign tax rebate constitutes a bounty or grant, that the remission of any taxes upon export of a product has the potential of operating as an incentive to exports.

[20] See note 11, *supra*, and accompanying text.

[21] *Cf. Walter Holm & Company* v. *Hardin*, 145 U.S. App. D.C. 347, 353, 449 F.2d 1009, 1015, where the court stated: "The kind of procedure required must take into account the kind of questions involved."

This assumption was expressed by the *Downs* Court[22] and has been urged by Zenith throughout these proceedings.

The assumption is based on the following, somewhat simplified reasoning. When an indirect tax such as that here under consideration is imposed on consumer products produced in a country, but the tax is rebated at the border for those products which are exported, the following consequences would initially be expected in many cases: (i) the price to domestic consumers of the selected items is raised, thereby reducing sales; (ii) the producer can recapture these sales only by reducing its prices to domestic customers, with the result that the producer bears part of the tax; and (iii) the producer can therefore make more money on an export sale, which is free of tax, than on a domestic sale, so there is then an incentive for the producer to shift his selling emphasis to exports.[23]

[22] *Downs* v. *United States*, 187 U.S. 496, 515 (1903).

[23] In evaluating whether a tax rebate upon export constitutes a bounty or grant, the Treasury Department has long distinguished between rebates of direct taxes and rebates of indirect taxes. The latter, which are imposed on the product itself, are considered by the Treasury not to be bounties or grants. On the other hand, rebates of direct taxes—those imposed on the manufacturer, such as income taxes and payroll taxes—are considered to be a bounty or grant.

This distinction is based on the highly questionable assumption that different economic consequences necessarily attach to rebates of direct and indirect taxes. Respondent has offered the traditional justification for the distinction that indirect taxes are fully "passed on" to the consumer and that, accordingly, their rebate upon export does not provide an incentive for the manufacturer to export, rather than sell domestically. Brief of the United States in Opposition to Petition for Certiorari 6-7. However, there is general agreement among contemporary economists that indirect taxes are not always fully shifted forward. Nor are direct taxes fully borne by the manufacturer. Demand for the product, monetary and competitive conditions, and the position of the manufacturer inevitably affect the "shifting" of both direct and indirect taxes. *See* Executive Branch GATT Studies, No. 1, "Tax Adjustments in International Trade: GATT Provisions and EEC Practices," at 7, Sen. Comm. on Finance, 93d Cong., 2d

2. When an Indirect Tax Covers All or Most of a Country's Products, Adjustments To Exchange Rates and Wage Rates Will Negate the Advantage That Might Accrue to Export Sales.

The statutory assumption just described is not the end of the inquiry, but is only a first step in the analysis. There are different schemes of indirect taxation, with varying consequences for production and trade. At one extreme is

Sess. (Compilation of 1973 Studies Prepared by the Executive Branch: Comm. Print 1974); K. Dam, The GATT—Law and International Economic Development 214-16 (1970); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 351 (1975); Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law & Pol. Int'l Bus. 85, 107, 109-11, 120 (1970).

Officials of the Treasury Department have themselves admitted that the direct/indirect distinction is not always justified. *See, e.g.*, remarks of former Assistant Secretary of the Treasury Petty in a paper for the Twenty-first Annual Conference of the Canadian Tax Foundation, November 20, 1968: "Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality."

In its briefs the United States has also argued that a countervailing duty on products benefiting from rebate of indirect taxes would lead to double taxation "that would result from the imposition of similar taxes by the importing country." Brief of the United States in Opposition to Petition for Writ of Certiorari at 6. However, it seems an artificial posture to presume that export remission of one country's particular kind of tax will always, or even normally, be offset by equivalent taxes in the importing country, or that a double tax will occur if export remissions are not made. In limited situations such as liquor taxes, where there is a fairly uniform practice of taxation on the "destination principle" (*i.e.*, the excise tax is not paid on export, but is applied by the nation where the product is sold for consumption), the Treasury Department might conclude after examination of the facts that no trade distortion is caused by the foreign tax remission since the U.S. excise tax on liquor has an effect comparable to a countervailing duty. It might then conclude, on such specific facts, that no "bounty or grant" is present. But such a conclusion must be based on actual facts and not on an unrealistic presumption that all foreign indirect tax remissions will be offset by U.S. sales taxes.

a uniform indirect tax applicable to all or most products sold in a country, such as the West German value-added tax and the Canadian excise tax.[24] At the other extreme is an indirect tax applied only to a relatively small group of products, either at a uniform or variable rate. The Japanese Commodity Tax is an example of such a selective indirect tax scheme, inasmuch as it applies to a limited range of products.[25] Between the extremes are schemes that impose an indirect tax on all or nearly all products, but at varying rates for different groups of products, with a few groups at the high end of the tax spectrum. The French value-added tax is of this kind.[26]

Modern economic analysis indicates that the rebate at the time of export of a uniform, general indirect tax does not cause permanent distortions to international trade, so long as currency values are free to change. The imposition of such a uniform and general tax affects all prices and production incentives throughout an economy. The balance of payments of the country is thereby affected, as the tax reduces domestic purchases and imports, and increases exports. However, all these effects on the nation's economy are generally offset by corresponding increases in the value of the country's currency and increases in domestic

[24] The West German VAT is applied at 11% to nearly all goods; a reduced rate of 5½% is applied to foodstuffs and agricultural products. Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries 128-31 (1968). The Manufacturers Sales Tax of the Canadian federal government is a general, single-stage tax of 12% that applies to most goods. *Id.* at 116-118.

[25] *See* Appendix A and discussion in II.A., *infra*.

[26] The French VAT is applied to most goods at the rate of 17.6%. A reduced rate of 7% applies to certain foods, agriculture products, fish and books. A 33.3% rate applies to new passenger cars, motorcycles, photographic equipment, radios, tape recorders and furs. Business International Corp., Investing, Licensing & Trading Conditions Abroad—*France* at 20 (1977).

wage levels. After these exchange and wage rate changes, the allocation of resources and composition of the country's domestic and export trade are largely restored to the conditions that prevailed before imposition of the tax. Thus, no enduring incentive to export has been provided.[27] In these circumstances, the problem which Congress sought to remedy in Section 303 is not present. Systems of general indirect tax and border adjustment do not operate as bounties or grants upon the manufacture or export of articles so long as an international system of floating exchange rates allows such tax systems to be offset by adjustments in currency values.[28]

---

[27] It is well established among economists that the imposition of a uniform ad valorem export subsidy and a corresponding import duty is the equivalent of a currency devaluation of the same percentage: it can be perfectly offset by a corresponding revaluation, or a combination of revaluation and an increase in the general level of wages and prices. *See* J. E. Meade, The Balance of Payments, 263-64 (1951). Thus a uniform export rebate which acts as an export subsidy and an import duty can be and normally is offset by corresponding exchange rate or wage-price adjustments leaving resource allocation and production incentives the same as before the imposition of the rebate. Therefore, under a system of flexible exchange rates, a uniform and general rebate does not create a general incentive to export and thus does not cause substantial or permanent distortion of trade. *See* Council on Wage and Price Stability, Report to the President on Prices and Costs in the United States Steel Industry 91-92 (1977); R. Baldwin, Nontariff Distortions of International Trade 179-80 (1970); Federal Trade Commission, Staff Report on the U.S. Steel Industry and its International Rivals 314-15 (1977).

[28] General indirect taxes such as the high-rate value-added taxes of Europe were unknown at the time when *Downs* was decided and when Treasury struck upon its distinction between direct and indirect taxes. The relatively recent proliferation of value-added taxes is an example of the dynamism of national practices which requires careful consideration by the Treasury Department of the trade effects of each country's indirect tax system before countervailing duty determinations are made.

3. When an Indirect Tax Is Selective, the Rebate Upon Export Does Promote Exports.

When an indirect tax is levied only on selected items and is rebated upon export of these items, the initial assumption that remission subsidizes exports holds true. In these circumstances, like those prevailing under a general indirect tax, exchange and wage rates are affected. However, because only a relatively small portion of the gross national product and balance of trade of the country are affected by a selective tax, changes in the country's overall exchange rate and wage rates will be minimal. They will not be sufficient to offset the export-incentive effect of the tax remission on specific products. For example, a 15 or 20 percent excise tax on automobiles, remitted at the border, would create a substantial export incentive. If this tax were not generally imposed on other products in the economy, the exchange rate and wage rate adjustments would be quite small and would not offset the 15 or 20 percent incentive on automobiles. The diversion of sales of the taxed product from domestic to export markets mentioned in I.B.1. above would become permanent.

This permanent effect is described in a recent report of the Council on Wage and Price Stability as follows:

> "There are two varieties of export incentives: general and selective. General measures have across-the-board effects on production costs in all exporting industries, while selective measures apply only to targeted industries. General measures are unlikely to alter significantly the commodity composition of a nation's exports. . . .

> Nor would they exert a significant long-term effect on the trade balance since exchange rates would shift in a compensatory fashion. Selective measures are designed to accomplish such mix changes by causing shifts in relative prices and production levels within the various exporting industries. . . if the VAT [value-added tax] on steel is not different than the VATs on other European exports, it is unlikely that VAT rebates to steel exports significantly improve the competitiveness of the European steel industry. On the other hand, if the VAT [on steel] is substantially higher than the average rate of value-added taxation, the rebate should improve the competitiveness of European steel." [29]

Thus, in the words of one economist, a selective tax scheme, with rebates on exports, is "equivalent to imposing a tax on domestic output and simultaneously introducing an export subsidy." [30]

The Japanese commodity tax applies to products that represented less than eight percent of total domestic consumption in fiscal year 1976. The tax is levied at rates of between 5 percent and 30 percent for varying groups of products. The average rate appears to be about 15 percent.[31]

A fifteen percent tax, for example, on only eight percent of domestic consumption, with rebate on exports,

[29] Council on Wage and Price Stability, note 27 *supra* at 91-92.

[30] R. Baldwin, Nontariff Distortions of International Trade 101 (1970).

[31] *See generally* T. Hayashi, Guide to Japanese Taxes, 27-30 (1977). The eight percent figure was calculated from statistics released by the Japanese National Tax Administration and in the OECD Quarterly National Accounts Bulletin 1977/IV.

obviously would have only limited effects on the exchange rate of the yen. It would therefore only minimally offset the incentive to export created by the rebate. The incentive to export remains.[32] We believe it likely that investigation of these facts on remand would lead to a conclusion that the Japanese tax remission constitutes a "bounty or grant."

C. *Inquiry Into the Operation and Effect of Foreign Tax Remissions is Entirely Feasible and is Consistent with this Court's Prior Decisions Under the Act.*

Upon remand, the Treasury and the lower courts should be instructed to discard the erroneous "bright-line" distinction between direct and indirect taxes, in favor of an examination of actual economic effects. Contemporary economic analysis demonstrates that if a line is to be drawn in order to facilitate administration of Section 303 as it affects border rebates of taxes, that line should distinguish between selective and general indirect taxes.

It is important to note that disregarding the present direct/indirect distinction would call on the Treasury Department only to make analyses that are clearly within the scope of its demonstrated capacity. Inquiries of the type proposed here are no more complex or difficult than

[32] The same conclusions would also follow in a case such as the French system involving a general tax on all items where selected items are taxed at higher than average rates. The adjustment mechanisms described in the preceding section, concerning general and uniform tax systems, would offset the effect of the *average* tax, but those who produce products which are taxed at a higher than average rate would still have an incentive to export them since the tax remission on export exceeds the amount of the general economic adjustments.

the type of study the Department now performs in evaluating the export incentive resulting from rebates of direct taxes.[33]

Nor is there anything in this Court's prior decisions under the Act which is inconsistent with the careful enforcement approach we suggest. Zenith has relied heavily on *Downs* v. *United States,* 187 U.S. 496 (1903), which, it claims, held in broad terms that "the forgiveness of taxes . . . upon exportation to the United States, constitutes the bestowal of a bounty or grant."[34] The Customs Court similarly rested on *Downs* in granting Zenith's motion for summary judgment. 430 F. Supp. at 244. Zenith and the Customs Court also placed much weight on what they perceived to be Congressional ratification of the *Downs* "holding" by reenactment of the countervailing duty statute in subsequent years.[35] The Government and the Court of Customs and Patent Appeals, on the other hand, find support in *Downs* for their position that only "excessive" rebates of individual taxes constitute bounties or grants.[36]

Laying aside the formidable problems encountered in interpreting *Downs* and in determining whether Congress intended to ratify the *Downs* "holding" as Zenith characterizes it, the fact remains that the character and significance of indirect taxes and their rebate upon exportation

[33] Another example of the Department's capacity for complex analysis is a recently proposed antidumping regulation that would require rather complex adjustments to reflect differences in economic factors between a state-controlled-economy country and a non-state-controlled-economy country. *See* 43 Fed. Reg. 1356 (January 9, 1978).

[34] Brief of Zenith Radio Corporation before the Court of Customs and Patent Appeals 13.

[35] *Id.* at 10, 430 F.2d at 245.

[36] Brief of the United States Before the Court of Customs and Patent Appeals 44-45; 562 F.2d at 1215.

have changed enormously since the early twentieth century. In *Downs* the remission of the indirect tax was on a single product — sugar — and was intimately related to Russia's whole regulatory scheme for that commodity. In *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), another early case cited by Zenith, the tax and remission again applied only to a single product—spirits—and were again part of an overall regulatory scheme.

Today, on the other hand, most European countries impose indirect taxes on virtually all products sold domestically and forgive these taxes on all exports.[37] These taxes and remissions do not appear to be part of a scheme of regulation that masks an intent to promote exports of a particular product or group of products. On the contrary, the governments of such nations as the United Kingdom, France and the Federal Republic of Germany rely on indirect tax systems (the so-called value-added tax, or "VAT") for large proportions of their revenues.[38] These VAT's are, in effect, partial substitutes for the income tax, which provides a relatively higher proportion of the cost of the government in the United States.[39] The character and economic effects of these taxes are vastly different from those of Russia's turn-of-the-century tax on sugar consumed domestically and tax remissions for sugar exports.

[37] *See generally* Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries (1968).

[38] In 1975, for example, VAT's accounted for the following percentages of central government tax revenues: West Germany—14.7%; France—23.3%; Belgium—15.7%. Organisation for Economic Cooperation and Development, Revenue Statistics of OECD Member Countries, 1965-1975 (1977). These figures compare with the less than 5% of central government revenue raised by the Japanese Commodity Tax. *Id.* at 148-49.

[39] Marks & Malmgren, *supra,* note 7, at 353. OECD, Border Tax Adjustments note 37 *supra* at 260-61.

* * *

If Section 303 is to remain a safeguard against unfair trade practices, its interpretation must be responsive to developments in international trade and national regulation. At the same time, care must be taken to ensure that the law to combat unfair trade practices is not itself administered unfairly as would be the case if practices which have no effect on exports are treated as "bounties or grants," unnecessarily subjecting foreign exports to countervailing duties in the U.S. These objectives can best be achieved if, in administering the Statute, careful examination is made of the individual foreign tax programs at issue.

II. If This Court Enters Judgment For Zenith, It Should Do So On The Basis Of The Facts Peculiar To The Japanese Tax Involved In This Case.

If this Court reverses the Court of Customs and Patent Appeals and holds that the Japanese Commodity Tax Law is a "bounty or grant" within the meaning of Section 303, it should base its decision on the selective nature of the Japanese scheme and its concomitant distortion of normal trade and production patterns, as described in part I.B.3. above. The decision should not implicate general and uniform indirect taxes and border remissons such as the value-added taxes of many European nations and the Manufacturer Sales Tax of Canada. That is, this Court should not adopt a "*per se*" rule that would apply to all tax remissions on export, but should allow the Department of the Treasury to distinguish—if the facts warrant—other indirect taxes and border rebates from the Japanese scheme. In short, a finding for Zenith should not compel a later determination

that rebate of European value-added taxes or Canadian federal sales taxes are also "bounties or grants."

A. *The Japanese Commodity Tax Law Is A Selective Indirect Tax That Confers A Competitive Advantage On Exports.*

Although there is no evidence that the operation and effects of the Japanese Commodity Tax have been fully explored by the Treasury Department and the lower courts, it is clear that the tax is applied only to a limited number of products, which constitute less than eight percent of domestic consumption.[40] As such, the tax raises domestic consumer prices of the items to which it applies while decreasing the return to the manufacturer, and thereby provides an incentive to increase export sales of these items. The taxes collected on these products annually amount to less than five percent of Japan's total revenue.[41] The Japanese commodity tax is clearly not one of general applicability, and changes in exchange rates and wage rates can only partially neutralize the incentive to export the specific products to which the tax and rebate program applies. Nor does the Japanese Commodity Tax Law raise a major portion of the government's revenue, as is the case with the European value-added taxes.

The function of the Japanese Commodity Tax Law in stimulating exports while suppressing domestic demand is underscored by the fact that the selected products covered by the law include Japan's major consumer exports to the United States. In addition to the consumer electronic products which occasioned Zenith's complaint (including radios, televisions, tape recorders and stereo equipment),

---

[40] See Appendix A for a list of these product groups.

[41] *See* note 38 *supra*.

the list includes passenger cars. These two categories of products alone account for more than half of all consumer exports from Japan to the United States.[42] Other significant consumer exports also appear on the list, such as motorcycles, snowmobiles, cameras, air conditioners and furniture.

By selecting these products for its commodity tax and export rebate program, Japan effectively creates an economic incentive for its manufacturers to export their products rather than sell them in the home market. The tax raises the price to the consumer in Japan on television sets, radios, passenger cars, and the other items taxed relative to the majority of products, which are not subject to the tax. Domestic demand for these products is accordingly lower than it would be absent the tax. On exports, however, the tax is rebated at the border, and the Japanese manufacturers experience no suppression of demand or price in its export markets. Thus manufacturers have an incentive to divert their supply of these items to the more profitable export markets, of which the United States is one prominent example.

B. *A Narrow Holding Is Necessary if the Purpose of the Countervailing Duty Statute Is To Be Respected.*

As explained earlier, the complexities of international trade and the variance among national tax practices requires close examination of the effects of any export rebate of indirect taxes before it is determined to be a bounty or grant. Only through such an examination can the broad language of the countervailing duty statute rationally be applied in practice.

---

[42] U.S. Department of Commerce, United States Trade with Major Trading Partners 1969-75 (1976), at 29-32.

As discussed previously, the general and uniform value-added tax, as used by some European countries and Canada, brings forth an adjustment of exchange rates and wages, which neutralize any export incentive the tax programs might create. No trade distortion occurs. *Prima facie* it would be a perversion of Section 303 to apply countervailing duties to the products of countries with such generalized indirect tax systems.

C. *A Narrow Holding Is Further Compelled By The Unique Circumstances Of Long-Standing Reliance On Established Administrative Practice.*

Because the Treasury Department has consistently refused to make an affirmative determination in any case of a "non-excessive" indirect tax remission, and because such refusals have been subject to judicial review only since 1975, great reliance on the Treasury Department position developed among businesses in the United States and abroad, and among the governments of major trading nations. Some of these foreign governments, such as the European nations, have made major structural changes in their tax systems on the assumption that the U.S. Government would not consider rebates of indirect taxes to be bounties or grants under U.S. law. It is certain that if these governments had any reason to believe otherwise, they would have negotiated these issues with the United States prior to effecting internal tax reform.

This case, then, presents a unique situation in which an administrative practice has developed over three-quarters of a century without opportunity for judicial oversight and modification. In these circumstances, a broad holding by this Court that potentially places a new and unexpected burden on exports from the European

Community and certain other nations should clearly be avoided, especially since the very different tax programs of those countries are not involved in the case before the Court. Such a holding would immediately strain U.S. economic relations not only with the European nations, but also with Canada, which also has a widespread excise tax and border rebate system.[43]

III. If This Court Affirms The Decision Of The Court Of Customs And Patent Appeals, Its Decision Should Not Preclude Later Determinations That Rebates Of Specific Indirect Taxes Are Bounties Or Grants.

If this Court affirms the court below and holds that the Japanese Commodity Tax Law does not constitute a "bounty or grant" within the meaning of Section 303, its decision should rest on the absence of proof at this time that the Japanese scheme provides an incentive to export to the U.S. marketplace. The Court should make clear that it is not establishing a fixed rule of law that such border rebates of indirect taxes can *never* be bounties or grants under the statute.

In so framing its decision, this Court will leave with the Secretary of the Treasury his statutory authority to determine that rebates of specific taxes do constitute bounties or grants within the meaning of Section 303. Thus, the Department of the Treasury will continue to perform the role assigned to it by law. The Secretary should, however, be required to rest these determinations on a careful examination of the operation and effect of the rebate schemes in question and to provide reasons for his

[43] *See* Organisation for Economic Cooperation and Development, Border Tax Adjustments and Tax Structures in OECD Member Countries 116-118 (1968).

determinations. The application of the statute can thus be adapted to economic realities by the Secretary's exercise of discretion on a continuing basis, and meaningful judicial review of this discretion will be possible.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to remand the case for consideration of the operation and effects of the Japanese Commodity Tax Law. If the Court does not remand, Amicus urges action consistent with the other alternatives suggested.

Respectfully submitted,

ROBERT E. HERZSTEIN
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Amicus Curiae

Of Counsel:

H. R. NOLTE, JR.
Vice-President—General Counsel
M.S. EVELEV
Ford Motor Company
Dearborn, Michigan 48121

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

APPENDIX A

Typical Products Taxed and Applicable Rates

Class I: Luxuries taxed at the retail level

10% Rate: Carpets, rugs, and other furnishings of textiles

15% Rate: Articles (other than clocks and watches) of, combined with, trimmed in, plated with precious stones, pearls, gold, platinum, coral, amber, elephant tusks, and furskins

Class II: Consumer goods taxed at the manufacturer level

5% Rate:
- Microphones
- Motorbikes
- Passenger cars (engines under 550 cc)
- Beverages—coffee, tea, cocoa, fruit juices, soft drinks
- Toilet preparations

10% Rate:
- Snowmobiles
- Waterskis and water sports equipment
- Motorboats, yachts, rubber boats, motors (small size)
- Perfumery and manicure

~~15% Rate~~:
- Radios, sound recorders, clocks made from non-precious materials

15% Rate:
- Passenger cars (engines over 550 cc up to 2,000 cc)
- Certain consumer electronic products—radios (stereo type), television sets, stereo equipment, TV picture tubes
- Electric blankets
- Stoves, ranges, ovens, radiators
- Refrigerators with capacity less than .17 cubic meters
- Dish washers, washing machines
- Fans, vacuum cleaners, food mixers
- Photographic equipment and supplies—cameras, projectors, film, flashbulbs

BEST COPY AVAILABLE

Car air conditioners scrolls
Motorboats, yachts, ~~shells~~ (medium size)

20% Rate: Passenger cars (engines over 2,000 cc)
Lighting equipment—chandeliers and desk lamps
Refrigerators with capacity greater than .17 cubic meters
Room air conditioners
Furniture
Bags and trunks
Smokers articles
Pinball machines, bowling goods

30% Rate: Golf equipment—clubs, balls, bags
Camping trailers; campers
Hunting firearms
Billiard equipment
Motorboats (longer than 8 m.)
Yachts (longer than 9 m.)

Sources: Tax Bureau, Ministry of Finance (Japan), An Outline of Japanese Taxes
T. Hayashi, Guide to Japanese Taxes (1977)

Supreme Court, U. S.
FILED
MAR 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

PETITIONER'S OBJECTION TO FORD MOTOR COMPANY'S MOTION TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF REMAND

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

March 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

PETITIONER'S OBJECTION TO FORD MOTOR COMPANY'S MOTION TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF REMAND

Petitioner is opposed to the motion of Ford Motor Company ("Ford") to file a brief as *amicus curiae* and respectfully urges that the motion be denied. Ford would use the *amicus curiae* brief as the vehicle by which to argue that the remission, on exportation, of the (selective) Japanese commodity tax, *i.e., the tax in issue*, is distinguishable from the remission, on exportation, of other (general and nonselective) taxes, such as the European value-added tax and the Cana-

dian federal Manufacturers Sales Tax, *i.e., taxes which are not in issue but which are rebated on the exportation of products imported by Ford.* Curiously, in its effort to caution this Court against deciding the issue before it in overly broad language, which could be harmful to Ford's interests, Ford invites the Court to address itself to an issue clearly *not* before it, in language favorable to Ford's interests. Under the circumstances, it appears that the presence of the *amicus* brief would be more burdensome than helpful, and, indeed, might inspire the applications of numerous *amici* to submit briefs on the value-added tax question, even though not an issue in the case.

WHEREFORE, for the reasons stated, Ford's motion to file an *amicus curiae* brief should be denied.

Respectfully submitted,

EUGENE L. STEWART, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

FREDERICK L. IKENSON, ESQ.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

PHILIP J. CURTIS, ESQ.
1000 Milwaukee Avenue
Glenview, Illinois 60025

Attorneys for Petitioner

March 1978

MOTION FILED
APR 10 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE UNION DES INDUSTRIES DE LA COMMUNAUTE' EUROPEENNE AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

N. DAVID PALMETER
1819 H Street, N.W.
Washington, D.C. 20006
Attorney for Amicus Curiae

Of Counsel:

DAVID P. HOULIHAN
DANIELS, HOULIHAN, & PALMETER
1819 H Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE UNION DES INDUSTRIES DE LA COMMUNAUTE' EUROPEENNE AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Pursuant to Supreme Court Rule 42(3), Union des Industries de la Communaute' Europeenne (hereinafter "UNICE") respectfully moves for leave to file the attached brief as Amicus Curiae in support of affirmance of the judgment below. Counsel for respondent has consented to the filing of this brief; counsel for petitioner has not consented.

The interest of Amicus is as follows:

UNICE represents the interests of the industries of the Member States of the European Economic Community.[1] The industries in the EEC engage in extensive international trade,[2] and the economic interests of these industries thus are influenced to a considerable degree by the international terms of trade. Indeed, a major shift in these terms of trade could produce a threat to the survival of various European companies.

The holding of the Court in this case could result in a basic change in these terms or conditions. The petition seeks a holding that the non-excessive remission of indirect taxes upon the export of a product constitutes a "bounty or grant", within the meaning of Section 303 of the Tariff Act of 1930, as amended. Such a holding would reverse a practice that has governed international trade for more than three quarters of a century, and nullify formal rules that have governed trade in the post-World War II era. The petition thus questions one of the basic principles on which the trade of most countries is based, including the trade of the United States, Japan and the EEC. The interests of the industries in the EEC, consequently, could be affected vitally by the outcome of this case.

Since a Supreme Court decision on the issue in this case has important international ramifications, UNICE

[1] UNICE is the Union of Industries of the European Communities, and includes industries in Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom.

[2] Exports account for approximately 22 percent of the Gross Domestic Product of the nine Member States of the EEC. Exports from these countries to the United States account for approximately 17 percent of United States imports.

seeks to bring to the Court through an Amicus Curiae brief the benefit of its collective experience with international attempts to avoid distortion in day to day world trade, and the implication of that experience as it bears on the question of the reasonableness of the decision of the Secretary of the Treasury at issue here. Accordingly, Amicus requests that this Court grant leave to file the attached brief.

Respectfully submitted,

N. DAVID PALMETER
Attorney for Amicus Curiae

Of Counsel:

DAVID P. HOULIHAN
DANIELS, HOULIHAN, & PALMETER
1819 H Street, N.W.
Washington, D.C. 20006

TABLE OF CONTENTS

	Page
STATUTE INVOLVED	1
QUESTION PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. Section 303 Requires the Secretary of the Treasury to Interpret the "Bounty or Grant" Provisions of the Act in a Reasonable Manner	4
II. The Secretary's Interpretation of the Statute Is Reasonable	7
A. The Secretary's Determination Is In Accord With Other International Attempts To Achieve Trade Neutrality	7
B. The Secretary's Determination Is In Accord With Internal United States Treatment of Consumption Taxes	12
C. The Secretary's Determination To Adhere to the Long-standing Interpretation Is in Accord With International Trading Relationships	14
CONCLUSION	16

TABLE OF AUTHORITIES

STATUTES:

Sherman Act, 15 U.S.C. §§ 1 et. seq.	6
Tariff Act of 1930, 46 Stat. 590, Section 303 [19 U.S.C. § 1303 (Supp. V 1975)]	1, 4, 5
Trade Act of 1974, P.L. 93-618, 88 Stat. 2041, et. seq. (1975) Title III	5

Page

CASES:

McGoldbrick v. *Berwind-White Co.*, 309 U.S. 33 (1940) 13

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 6

Southern Pac. Co. v. *Gallagher*, 306 U.S. 167 (1939) .. 13

Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) .. 6

MISCELLANEOUS:

Executive Branch GATT Studies, Committee on Finance, United States Senate, Compilation of 1973 Studies Prepared by the Executive Branch, 93d Cong., 2d Sess., 19 (1974) 8, 10, 11

General Agreement On Tariffs and Trade (GATT), 61 Stat. pt. 5 at A3 ..... 7, 8

H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 134 (1973) 5

Kust & Sale, *State Taxation of Interstate Sales*, XLVI Va. L.R. 1290, 1300-1301 13

S.Rep. No. 93-1298, 93d Cong. 2d Sess. 163 (1974) 5

Shoup, C.S., Indirect and Direct Taxes and Their Influence on International Trade, In Excise Tax Compendium, Compendium of Papers On Excise Tax Structure, Submitted to the Committee on Ways and Means in Connection With the Panel Discussion On the Same Subject to be Conducted by the Committee on Ways and Means on June 15, 1964. (G.P.O. 1964) 9

The EEC Report on Tax Harmonization, Int. Bur. of Fiscal Documentation, Amsterdam, 1963 11

Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 ..... 7, 10

U.N. Doc. ST/ESA/SER. E/G (1976) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

BRIEF OF UNION DES INDUSTRIES DE LA COMMUNAUTE' EUROPEENNE AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

STATUTE INVOLVED

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303(a)(1) (Supp. V 1975) provides:

> "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or

merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

QUESTION PRESENTED

Whether the remission of the Japanese Commodity Tax, which is imposed on certain consumer electronic products only if they are sold in Japan, is a bounty or grant within the meaning of Section 303 of the Tariff Act of 1930.

STATEMENT

Amicus agrees with the Statement of the case as set forth in respondent's brief. In brief, the Secretary of the Treasury has concluded that the non-excessive remission of indirect taxes—that is, those taxes imposed on or with respect to a product—does not constitute a "bounty or grant" within the meaning of Section 303 of the Tariff Act of 1930. The question for the Court is whether that interpretation of the statute is reasonable in light of the statutory language and its legislative history. Amicus agrees with respondent that this is a question of law, and that the statutory purpose and legislative history support the

Secretary's determination.[1] In this brief, Amicus contends that Section 303 requires the Secretary to interpret the "bounty or grant" provisions in a reasonable manner, and that the Secretary's determination is reasonable in view of the political and commercial realities of international trade.

SUMMARY OF ARGUMENT

Section 303 is a broadly worded unfair trade practice statute that must be construed reasonably in light of the congressional purpose. The statute necessarily is broad to permit the Secretary to respond flexibly to new and varied "unfair" practices, but this breadth does not require the Secretary to impose countervailing duties in circumstances where the congressional purpose would not be furthered.

The Secretary's interpretation, at issue here, is consistent with the General Agreement on Tariffs and Trade to which the United States is a party and the Treaty of Rome which established the European Economic Community (EEC). These international standards themselves grew out of United States proposals and practices. They were implemented to assure that the treatment of consumption taxes at international borders was trade neutral to the fullest extent possible and to permit fiscal autonomy to the country of consumption.

The EEC itself, in order to avoid trade distortion among its own members in intra-EEC trade, has adopted the practice of border tax remission consistent with the determination of the Secretary of the Treas-

[1] Amicus also agrees with respondent's position that the Secretary's position is not inconsistent with the prior cases of this Court.

ury in this case. For the Secretary of the Treasury likewise to determine that this practice is trade neutral in the context of a broadly worded unfair trade statute is eminently reasonable.

Moreover, the treatment of state and local sales taxes in interstate commerce within the United States parallels the international practice which the Secretary of the Treasury upheld in the determination at issue. This domestic experience underscores the reasonableness of the Secretary's determination in the international context of this case.

This Court should not overrule an 80 year administrative practice of the United States, which has achieved international sanction and approval, and upon which other nations and all international commerce have placed fundamental reliance, absent a compelling showing that continued adherence to the long-standing interpretation is unreasonable. No such showing is possible.

ARGUMENT

I. SECTION 303 REQUIRES THE SECRETARY OF THE TREASURY TO INTERPRET THE "BOUNTY OR GRANT" PROVISIONS OF THE ACT IN A REASONABLE MANNER.

Section 303 of the Act generally mandates that a countervailing duty be imposed whenever any country bestows a "bounty or grant" upon any product subsequently imported into the United States.[2] Although the statute requires the Secretary to impose a countervailing duty if in fact a "bounty or grant" is being paid or bestowed, it leaves to the Secretary the determination as to whether any given practice constitutes a "bounty or grant" within the meaning of the Act.

[2] There are exceptions not relevant here. Section 303(d) of the Act permits the Secretary to waive imposition of countervailing duties during a temporary period if certain findings are made.

Nowhere in the Act are the terms "bounty" or "grant" defined. In a literal sense, virtually any governmental assistance program could be considered a direct or indirect bounty or grant upon the manufacture, production, or export of merchandise. For example, government programs such as free public education can be said to provide an indirect benefit to manufacturing, by providing industry with an educated work force; government sponsored research and development directly benefits the industry manufacturing or producing the goods developed; and government-financed highways, by facilitating transportation, obviously benefit, at least indirectly, industries in the countries concerned. But no one would contend seriously that Congress intended to require the Secretary of the Treasury to levy countervailing duties to offset all programs that benefit industry. The terms "bounty" and "grant" are undoubtedly broad, but they must be construed in light of the congressional purpose to deal with "unfair" trade practices. Title III of the Trade Act of 1974,[3] which amended in part and reenacted the 1930 Act,[4] is entitled "Relief From Unfair Trade Practices". An identical description is given in the House Report,[5] and the Senate Report notes that "Title III deals with 'unfair' and 'illegal' trade practices adversely affecting U.S. commerce".[6]

Congress clearly selected such broad language to enable the Secretary to respond if any nation subse-

[3] 88 Stat. 2041 *et seq.* (1975).

[4] 19 U.S.C. § 1303.

[5] H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 134 (1973).

[6] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 163 (1974).

quently established any one of an unlimited number of programs designed to give its industries an "unfair" competitive edge. But the selection of language designed to give the Secretary the flexibility to respond to new and varied "unfair" trade practices should not be read to *require* the Secretary to impose countervailing duties in circumstances where the congressional purpose is not implicated.[7]

The Congress has charged the Secretary of the Treasury with the administration and enforcement of the provisions directed against unfair trade practices, including the determination as to whether the practices of foreign governments are bounties or grants and therefore are unfair and illegal. Judicial review of that determination should be in accord with the well-settled rule that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The agency's interpretation is entitled to considerable deference where, as here, the agency adopted its interpretation shortly after enactment of the statute and has consistently

[7] An analogous situation obtains with respect to the Sherman Act (15 U.S.C. 1 *et seq.*). In the course of mandating a rule of reason for interpretation of that Act, (Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911)) this Court noted that the Act's language was "broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce". Similarly, it can be said that Section 303 is "broad enough to embrace every conceivable" governmental practice. Clearly, the interpretation of Section 303's broad provisions—provisions in large measure directed toward the programs of friendly sovereign governments—must be based on a reasonable approach that takes account of the congressional purposes.

adhered to that interpretation for 80 years. Absent a clear showing that the Secretary's interpretation is "unreasonable" in light of the congressional purposes, his interpretation should be affirmed.

II. THE SECRETARY'S INTERPRETATION OF THE STATUTE IS REASONABLE.

A. The Secretary's Determination Is In Accord With Other International Attempts To Achieve Trade Neutrality.

The Secretary's long-standing interpretation of Section 303 is grounded on the view that nonimposition of a countervailing duty in the circumstances at issue here is essential to trade neutrality. The reasonableness of that view is supported by similar provisions in the General Agreement on Tariffs and Trade (GATT)[8] and the Treaty of Rome.[9]

Of particular interest are the international standards governing national treatment of indirect taxes upon exportation of products set forth in Article VI:4 of the GATT:

> "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[10]

[8] 61 Stat. pt. 5 at A3.

[9] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

[10] Article III, dealing with national treatment of internal taxes, permits the assessment of such taxes on imported products provided such assessment is not in excess of the taxes applied, directly or indirectly, to like domestic products.

This approach to the problem of the exemption of exported products from domestic consumption taxes, and the rebate to exporters of such taxes that may have been collected on the product prior to export, was originally proposed by the United States in 1946, in its Suggested Charter For An International Trade Organization Of The United Nations.[11] Upon the failure of the formation of an International Trade Organization of the United Nations, the General Agreement on Tariffs and Trade was entered into in 1947 and Article VI was adopted at that time.

Following a major Review Session of the GATT Contracting Parties, the provisions of the Agreement were made even more explicit in 1957 by Ad Article XVI:

> "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."

[11] Executive Branch GATT Studies, Committee on Finance, United States Senate, compilation of 1973 studies prepared by the Executive Branch, 93d Cong., 2d Sess., 19 (1974). The U.S. proposal which led to the provisions of Article VI:4 provided: "Except as provided in paragraph 3 of this Article, no Member shall grant, directly or indirectly, any subsidy on the exportation of any product, or establish or maintain any other system which results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability. *The preceding sentence shall not be construed to prevent any Member from exempting exported products from duties or taxes imposed in respect of like products when consumed domestically or from remitting such duties or taxes which have accrued.*" (Emphasis supplied.)

The Contracting Parties to the GATT with considerable justification rely upon the provisions of the GATT for the rules governing their trade with the United States. These GATT provisions governing border adjustments for consumption taxes rest upon the assumption that such taxes are borne by the consumer.[12] The objective is not to tax producers—there are more direct and efficient forms of taxation to achieve that result. And, the intent clearly is not to gain any advantage in international trade.[13]

To the contrary, the GATT provisions were implemented to assure that the treatment of consumption taxes at international borders was trade neutral to the fullest extent possible. The underlying rationale of GATT is that revenue from consumption taxes should inure to the government of the country of consumption; in this case, for example, it is the Government of the United States—or its states and localities—and not the Government of Japan, that is entitled to the pro-

[12] Some commentators point out that factors such as fiscal and monetary policies, the administrative mechanism of the tax, its evolution, and its uniformity can have a bearing on whether such taxes are completely shifted forward to the consumer. Abstract manipulation of these variables makes it possible to postulate a set of economic conditions in which consumption taxes, including U.S. retail sales taxes, are largely if not totally borne by the producer. Such abstractions may be valuable analytical tools but do not exist in the real world.

[13] "No country has imposed a general sales tax simply in order to gain an alleged advantage in international trade". C. S. Shoup, *Indirect and Direct Taxes and Their Influence on International Trade*, in Excise Tax Compendium, Compendium of Papers on Excise Tax Structure, submitted to the Committee on Ways and Means in connection with the panel discussion on the same subject to be conducted by the Committee on Ways and Means on June 15, 1964. (G.P.O. 1964), at 60.

ceeds of taxes levied on consumers in the United States. The result is that all like products in the country of consumption are taxed in a like manner.[14] Any other result would be unworkable. On the one hand, if consumption taxes were levied in the country of production but not the country of consumption, then imports in the consuming country would be either at an advantage or at a disadvantage in competition with domestic goods, depending upon the relative level of consumption taxes in the two countries.[15] On the other hand, if consumption taxes were imposed in both the country of production and the country of consumption, the goods would be subject to double taxation, a result that not only could greatly reduce the volume of international trade, but could itself be contrary to treaty obligations of the countries concerned.

The position taken in the GATT with respect to remission of indirect taxes also is followed in the European Economic Community. Article 96 of the Treaty of Rome provides:

> "Products exported to the territory of any Member State may not benefit from any drawback of internal charges in excess of those charges imposed directly or indirectly on them."

It is useful to note some of the background to this provision. The establishment of the EEC in the mid-

[14] "This concept was carried over into the GATT in 1947, as proposed by the United States and other countries, reflecting the practical view that governments and businessmen would not have accepted procedures which exempted competing imported goods from consumption taxes imposed on similar domestic goods." Executive Branch GATT Studies, *op cit.* 8.

[15] Trade neutrality would obtain only in the unlikely event that the taxes in each country were set at the same rate.

twentieth century posed more difficult problems for the Member States than did the establishment of the United States as a federal republic nearly 200 years earlier. The economies of the several states that formed the American federal union largely were agricultural, and their fiscal systems were not as complicated as those of present day Europe. The attempt to avoid trade distortion among EEC Member States thus presented obvious difficulties. Nonetheless, drawing upon the experience of the United States in solving similar problems relating to the tax systems of the several states as those systems applied to goods moving in interstate commerce, the experience gained through international trade,[16] and the international standards proposed by United States and accepted by its trading partners, and the EEC's own extraordinarily detailed analyses,[17] the EEC adopted Article 96 of the Treaty of Rome.

The goal of Article 96, like that of the GATT provisions, is trade neutrality in the treatment of indirect taxes at the borders of the Member States of the EEC. The EEC, because of political sensitivity, established administrative provisions to guarantee that even highly theoretical trade distorting aberrations among its Members could not occur. Had trade neutrality not been achievable, establishment of the EEC in all

[16] "Provisions similar to those in the GATT have been used in commercial treaties and agreements for over 100 years and were contained in bilateral trade agreements between the United States and other countries from almost the beginning of the reciprocal trade agrements program in 1934". Executive Branch GATT Studies, *op cit.* 8.

[17] The EEC Reports on Tax Harmonization, Int. Bur. of Fiscal Documentation, Amsterdam, 1963.

likelihood would have been impossible. The goal of trade neutrality among the Member States has been achieved through Article 96, just as the goal of trade neutrality internationally has been achieved through Article VI:4 of the GATT.

The GATT and the Treaty of Rome are founded upon principles derived from United States proposals and practice. Their intent and effect is to achieve trade neutrality and to avoid trade distortion in the treatment of indirect taxes at national borders. Virtually every affected government has determined that implementation of these provisions in the real commercial world has achieved the desired trade neutrality and avoided trade distortion. For the Secretary of the Treasury to determine likewise in the context of a broadly worded unfair trade practice statute is eminently reasonable.[18]

B. The Secretary's Determination Is In Accord With Internal United States Treatment Of Consumption Taxes.

Indirect taxes in the United States largely take the form of state and local sales taxes. States and localities impose these taxes upon consumers in their jurisdictions to raise revenue, not to gain trade advantages *vis-a-vis* other states and localities. In the course of

[18] Petitioners appear to contend that double taxation is the result intended by the Congress in enacting Section 303. Petitioners argue that consumer electronic products from Japan should be subject to consumption taxes in that country, as well as whatever consumption taxes may apply in the United States. Not only is such a result not mandated by Section 303, we submit, but further, such a result would produce the very trade distortion Section 303 was designed to eliminate.

holding that it is constitutionally permissible for the state in which final consumption occurs to impose consumption taxes on the products of interstate commerce, this Court observed:

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."[19]

The Court proceeded to note with respect to the consumption tax before it that:

> "Equality is its theme. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce."[20]

The United States' experience with interstate commerce—which is analogous to the issue presented with respect to international trade—indicates that trade is

---

[19] *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45 (1940).

[20] Ibid, 48-49 (Citation omitted). Possible duplication of tax burden could occur within the United States through the application of both sales and use taxes on interstate transactions. This Court never has specifically considered the problem, perhaps because most states have exempted from sales tax a sale pursuant to a contract requiring shipment outside the state. This practice constitutes the remission upon export from the state of an indirect tax. See, generally, Kust & Sale, *State Taxation of Interstate Sales*, XLVI Va. L.R. 1290, 1300-1301. See, also, *Southern Pac. Co.* v. *Gallagher*, 306 U.S. 167, 172 (1939) ("discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against a local tax of any such foreign levy.").

free and nondistorted when the jurisdiction of consumption rather than the jurisdiction of production collects the indirect tax. It was this experience with interstate commerce that prompted the United States to propose similar principles for the handling of indirect taxes in international trade. And it is this domestic experience that underscores the reasonableness of the Secretary's determination that the remission of indirect taxes is not a trade distorting "bounty" within the meaning of Section 303.

C. The Secretary's Determination To Adhere To The Long-Standing Interpretation Is In Accord With International Trading Relationships.

In the two previous subdivisions of this argument, Amicus has attempted to underscore the reasonableness of the Secretary's interpretation of the statute by pointing to the use of the same approach in similar contexts requiring trade neutrality. And it is the view of this Amicus that the widespread use of this approach in "trade neutrality" contexts would support the Secretary's determination even if that interpretation were of only recent origin.

But the Court does not have before it today a recent development in the establishment of international terms of trade. The interpretation at issue here has been the official position of the Secretary for 80 years, and the international trading partners of the United States clearly have taken action in reliance upon that construction. Industry also has constructed a network of world trade in which this practice constitutes the most fundamental fiscal principle. As noted earlier, the position of the United States was adopted in the GATT; indeed, the GATT provision exists largely due to the efforts of the United States.

Amicus respectfully suggests that this significant international reliance upon and adoption of a consistent United States policy is entitled to serious consideration in determining whether the Secretary's *continued adherence* to that long-standing interpretation is reasonable. Since the inception of GATT, numerous nations have established fiscal systems based in large measure upon indirect taxes in reliance upon GATT rules.[21] A holding that such tax systems violate a United States *unfair* trade practice statute not only would cause serious consequences in trade itself, but would have equally serious implications for the international relations of the United States.

It cannot be presumed that the other GATT Contracting Parties would be prepared to renounce their rights under the Agreement. The Contracting Parties would be forced, by the serious economic consequences that would follow such a decision, to take internationally-permitted counter measures. Moreover, the Contracting Parties to GATT presently are engaged in multilateral negotiations aimed in part at dealing with the entire question of countervailing duties and subsidies. A sudden change in the United States' 80 year practice, as sought by petitioners in this case, would destroy the good-faith basis for these negotiations.

---

[21] Among the GATT Contracting Parties employing indirect taxes are Argentina, Australia, Austria, Brazil, Burundi, Canada, Central African Republic, Chad, Chile, EEC Member States, Gabon, Ghana, India, Indonesia, Ivory Coast, Jamaica, Japan, Kenya, Korea, Madagascar, Malaysia, Mauritania, New Zealand, Nicaragua, Niger, Nigeria, Pakistan, Peru, Portugal, Senegal, Spain, Sweden, Switzerland, Tanaznia, Togo, Uganda, United Republic of Cameroon, United States of America, Upper Volta, Uruguay. U.N. Doc. ST/ESA/SER. E/6 (1976).

This Court should not render a decision that undoubtedly would introduce new uncertainty and instability into international trade absent compelling evidence that the Secretary has pursued an unreasonable approach in light of the congressional purposes.

CONCLUSION

The broad language of Section 303, its legislative history and stated purpose, and the non-trade-distorting effect of the practice in question compel the conclusion that the non-excessive rebate or remission of indirect taxes upon exportation of a product does not constitute a "bounty or grant" as a matter of law within the meaning of Section 303 of the Trade Act. Consequently, the judgment of the Court of Customs and Patent Appeals should be affirmed.

Respectfully submitted,

N. DAVID PALMETER
1819 H Street, N.W.
Washington, D.C. 20006
Attorney for Amicus Curiae

Of Counsel:

DAVID P. HOULIHAN
DANIELS, HOULIHAN & PALMETER
1819 H Street, N.W.
Washington, D.C. 20006

MOTION FILED
APR 11 1978

In The

Supreme Court of the United States

October Term, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN IMPORTERS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

SAUL J. SHERMAN
JOSEPH S. TILLMAN
Kaplan, Russin and Levy
750 Third Avenue
New York, New York 10017
Attorneys for Amicus Curiae

April, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN IMPORTERS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Pursuant to Supreme Court Rule 42(3), the American Importers Association, Inc. ("AIA"), hereby respectfully moves for leave to file the attached brief as amicus curiae urging affirmance. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner has not consented.

AIA is a non-profit trade association representing over 1,200 importers, large and small, and allied organizations such

as customs brokers, banks and others servicing the importing community. AIA was founded in 1921 to promote equitable international trade laws and administration.

AIA's interest in the present litigation is threefold. First, we seek to avoid the serious adverse effect on importations into the United States which a reversal of the decision below (where AIA also appeared as amicus) would entail. Very substantial additional duties would be imposed on a multitude of importations from Japan, and quite likely from other countries as well, if the decision below does not stand. Second, AIA seeks to promote United States observance of international agreements in the trade area by pointing out the relevance of our international commitments under GATT in the decision of this case. Third, AIA seeks to avoid the retaliatory measures and the possible prejudice to the Multilateral Trade Negotiations currently in progress in Geneva under GATT sponsorship, which might result from the imposition of countervailing duties in this case.

In support of these objectives, AIA seeks to advance two arguments. The first is a legal and policy analysis demonstrating that no undue favoritism to exports results from the mere remission of an excise tax, and that the Downs and Nicholas results and Section 303 are entirely consistent with the view that such remission is not a proper subject of a countervailing duty. The second point shows that, if the decision below does not stand, the law of the United States as it stood in 1947 would be changed in a direction the GATT Agreement forbids, and the reasonable expectations of other signatories to GATT would be defeated.

Respectfully submitted,

SAUL L. SHERMAN
JOSEPH S. KAPLAN
RIVKIN SHERMAN and LEVY
Attorneys for Amicus Curiae,
750 Third Avenue
New York, New York 10017

April 11, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF OF AMERICAN IMPORTERS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Amicus, the American Importers Association, Inc. ("AIA"), is a trade association whose membership of over 1,200 represents a broad spectrum of the importing community. AIA's interest in preventing adverse effects on the movement of trade, and in preventing injury to current efforts to build an international legal order in the area of international trade, is more fully set forth in the accompanying motion, to which the Court is respectfully referred. In the light of this interest, AIA urges affirmance of the decision under review.

Summary of Argument

I. Section 303 only imposes countervailing duties on the "net amount" of any bounty or grant. Mere forgiveness or remission of a commodity tax produces no such net benefit. The *Downs* and *Nicholas* decisions only granted relief against such net amounts. There being no net amount on the facts of this case, the Secretary's action in not countervailing is consistent with both judicial decisions and with the statute. The result is a perfectly sensible policy subjecting the exported product to taxation in the country of importation but relieving it of the double taxation petitioner seeks. This permits imports and domestic products to compete on a perfectly fair footing in the United States. The countervailing duty statute, consonant with the overall pattern of United States foreign trade regulations, is aimed only at unfair international competition.

II. The explosive subject of countervailing duties can only be properly regulated by international agreement. The General Agreement on Tariffs and Trade, to which the United States is a party, prohibits countervailing against the mere remission of a commodity tax. The 1947 grandfather clause in GATT is inapplicable because the Treasury interpretation of Section 303 here under attack was well established at the time and not subject to review. A reversal here would defeat the reasonable expectations of our trading partners abroad and raise serious questions as to whether the United States is honoring an international commitment.

ARGUMENT

I. Remissions of the Japanese Commodity Tax Are Not Subject to Countervailing Duties since they Produce No "Net Amount" of Benefit.

A. The Secretary's decision is consistent with law.

This Court has been presented with much discussion about the meaning of *Downs*[1] and *Nicholas.*[2] Little of that discussion

[1] *Downs* v. *United States,* 187 U.S. 496 (1903).

[2] *G. S. Nicholas & Company, et al.* v. *United States,* 249 U.S. 34 (1919).

focuses upon what the Court actually did in those cases. In *Downs,* the Court found that forgiveness of the excise tax and issuance of the transferable certificate were both bounties or grants, but assessed countervailing duties only on the net amount—the value of the transferable certificate. In *Nicholas,* the countervailing duty approved by the Court was against an out-and-out cash bonus. In determining the "net amount" of bounty or grant, the Court in both cases accepted the Secretary's conclusion that only an undue or excessive bounty or grant is to be countervailed, an amount which in *Downs* did not include the excise tax rebate.

The view that only the excessive portion of a bounty or grant is to be countervailed was and remains sound. It penalizes bounties or grants which give exported merchandise an artificial, governmentally created advantage over host country merchandise, but it permits tax laws which place exports on no better than an even footing with host country merchandise.[3]

Section 303[4] does not permit the Secretary to countervail against the exact amount or value of every bounty or grant, only the net amount. This limitation is not inadvertent, and may not be ignored as Zenith would wish.[5] A governmentally

[3] "The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market." *Downs, supra,* at 515. The imposition of ordinary duties and the subjection of imported goods to sales, excise, inventory, and other similar taxes are entirely within the power of the host country. The availability of these powers, not their exercise, is what is relevant to this case.

[4] 19 U.S.C. § 1303 (Supp. V 1975).

[5] "(N)et amount" first appeared in section 5 of the Tariff Act of 1897, 30 Stat. 151, and has appeared in each subsequent reenactment of the countervailing duty law. The concept first appeared in the Tariff Act of August 27, 1894, Paragraph 182 1/2, 28 Stat. 521, in which the exemption of non-excessive tax forgiveness was specifically stated. We can conceive no other purpose for including "net amount" in subsequent legislation than to broaden the exemption to all bounties or grants which are not excessive.

conferred benefit favoring exported merchandise which does not produce "a money reward or gratuity"[6] does not produce a net amount and is not to be countervailed. The Japanese commodity tax law places exports on an even footing with host country products (ignoring the added costs of customs duties, freight, etc., which work against the exported merchandise). It provides no "net amount" to the exporter against which the Secretary may countervail.[7]

As stipulated, the only benefit conferred on exported consumer electronic equipment by the Japanese government is an exemption from the tax on similar articles consumed at home. The exported goods are charged with receiving no more than a benign, economically neutral benefit—freedom from double taxation. Japanese origin consumer electronic products are freed from the burden of the Japanese commodity tax, but remain subject to all applicable federal, state and local taxes in the United States. They may be subject to inventory taxes in Georgia and California or sales taxes in New York and New Jersey the same as any other merchandise held or sold in those jurisdictions. Since they must face taxation in the host country taxing these goods at home would be distorting and anti-competitive. Subjecting such merchandise to countervailing duties would be equally distorting and anti-competitive; it would in effect provide competing host country merchandise with a bounty or grant which the exporting country could not equalize or neutralize.

The Secretary's determination not to countervail against remission or refunding of the Japanese commodity tax, affirmed by the CCPA, is a sensible and reasonable decision

---

[6] *Downs, supra,* at 516.

[7] This analysis permits affirmance without deciding whether the per se distinction between direct and indirect tax rebates is correct, as advocated by the United States. It would also be unnecessary to remand, as advocated by Ford, which has moved to appear as amicus, since under our proposed rule there is no countervailable economic benefit to the Japanese exporter on the exported merchandise.

which is consistent with the statute, with Treasury practice, and with what the Court actually approved in *Downs,* and should be affirmed by this Court.

B. The countervailing duty law protects against unfair competition; the Japanese commodity tax law permits fair, not unfair competition.

The limitation on the amount of countervailing duties to be collected under section 303 to the "net amount" of bounty or grant shows that Congress intended to redress unfair competition, not to initiate economic warfare by erecting a discriminatory trade barrier. The amendments to sections 303 and 516 of the Tariff Act of 1930 brought about by the Trade Act of 1974[8] did not change the substantive character of section 303, and do not justify the conclusion that even legislation promoting fair trade is now to be penalized.

United States public policy distinguishing between fair and unfair competition in international trade may be understood by examining the benefits which Congress has conferred on United States exports. Not only is there a significant panoply of risk-equalizing and competition-enhancing programs under the DISC and Export-Import Bank[9] regimes, but even imported articles are frequently benefited by exemption from customs duties if they are to be exported either unchanged or with value added.[10]

One may also compare the statutes which protect against *private* unfair competition from imports, particularly the Anti-

---

[8] Trade Act of 1974, §§ 321(f), 331(a), 19 U.S.C. §§ 1516, 1303 (1975). These changes made the administration of section 303 subject to time limits and provided for judicial review.

[9] *I.R.C.* § 991 *et seq.;* 12 U.S.C. §§ 82, 635.

[10] *See e.g.,* 19 U.S.C. § 81(c) (providing customs duty exemptions to merchandise in foreign trade zones), 19 U.S.C. § 1313 (providing drawbacks of duty on imported merchandise manufactured into other articles and exported), and item 864.05, Tariff Schedules of the United States, 19 U.S.C. § 1202.

dumping Act of 1921[11] and section 337 of the Tariff Act of 1930.[12] Section 337 provides that unfairly competing imports may be excluded from the United States. The Antidumping Act, like the countervailing duty law, provides for the neutralization of unfair competition through an equalizing duty. It is most instructive that fair value comparisons under the Antidumping Act are adjusted to account for differences in taxes.[13] If an export price which is lower than home market price on account of remission of taxes on exports does not constitute unfair competition by the exporter, then governmental actions which permit such differences to exist are not unfair competition either.

The benefit provided to exporters by the Japanese commodity tax law permits fair, not unfair, competition. The Secretary should not be required to countervail against it.

II. Imposition of Countervailing Duties Here Would Violate The Obligations of the United States Under the General Agreement on Tariffs and Trade.

Countervailing duties are by their very nature a somewhat civilized form of economic warfare between nations—one nation adopts a plan benefiting its exporters, and another takes action specifically designed to neutralize the effect of the first government's program. The potential for friction and explosion is evident, as is the need for intergovernmental agreement to keep the process within safe bounds.

Whatever the practical possibilities of international regulation may have been when the Tariff Act of 1897 and the *Downs* decision of 1903 appeared, the subject is today regulated by international agreement. Article VI (4) of the General

---

[11] Antidumping Act of 1921, § 201, as amended, 19 U.S.C. § 160.

[12] Tariff Act of 1930, § 337, as amended by the Trade Act of 1974 § 341, 19 U.S.C. § 1337 (1975).

[13] 19 C.F.R. § 153.27(a)(3)(vii).

Agreement on Tariffs and Trade ("GATT"), 61 Stat. A24, provides:

> "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to . . . countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[1]

Plainly the application of this provision would require an affirmance in this case. There is, however, one important complication to be considered. GATT was adopted in 1947 by the United States and other governments signing a so-called Protocol of Provisional Application of the General Agreement on Tariffs and Trade. 4 Treaties and Other International Agreements of the United States of America 1776-1949 at 687. Paragraph 1(b) of that Protocol commits the signatories:

> ". . . to apply provisionally on and after January 1, 1948 . . . Part II of [GATT] to the fullest extent not inconsistent with existing legislation."

This grandfather clause should have no application here, even though Article VI(4), quoted above, falls within Part II of GATT. For it was clear on January 1, 1948 (and for many decades before) that under Section 303 and its predecessors in the United States no countervailing duty was imposed by

---

[1] See also Annex I to GATT, Notes and Supplementary Provisions, Ad Article XVI:

> "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." 4 Basic Instruments and Selected Documents, Dept. of State Publication No. 8468, p. 68.

This provision was added to GATT in 1955, effective 1957. *Id.* at 88.

reason of the exemption of exports to the United States from foreign product taxes.

Had the other contracting parties asked in 1947 what the law was in the United States on this question, they would undoubtedly have been told in substance what the United States government told GATT in 1958:

> "The countervailing duty law is found in Section 303 of the Tariff Act of 1930; United States Code 1303.
>
> * * *
>
> "Remission of internal taxes borne by a product is one method by which a bounty or grant can be bestowed indirectly. *If the remission does not exceed the amount of taxes previously paid, however, then such remission is not considered a bounty or grant.*" Statement of the United States Concerning Countervailing Duty from "Anti-Dumping and Countervailing Duties," GATT/1958, pp. 138-139 (1958), reprinted in 1 Metzger, Law of International Trade 905, 906 (1966) (italics ours).

Congress provided no judicial review of a negative determination by the Secretary of the Treasury in a countervailing duty case as of 1947 (and indeed not until the Trade Act of 1974).[2] Thus, the Treasury rule—no countervailing against the mere remission of a product tax—was the definitive interpretation of Section 303 under the Congressional scheme which was in

[2] *Downs* and *Nicholas* both involved affirmative administrative determinations imposing countervailing duties as to the net amount of the export subsidy (the certificates in *Downs*, the 3d and 5d in *Nicholas*). These net subsidies were the subject of the judicial review, as noted above.

effect as of 1947. Had the Treasury reading so far departed from the terms of the statute or from the holding in *Downs* as to be plainly erroneous, perhaps our trading partners would have been on notice in 1947 that they should not rely upon the Treasury interpretation. But surely the Treasury position was a perfectly reasonable reading of both the statute and the judicial gloss.

We respectfully suggest that where, as here, there is available a long-standing, reasonable interpretation of a statute which will avoid any question of whether the United States is honoring an international agreement, that interpretation should be adopted over another which would raise just such a question. Cf. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1947). Only in this manner can the reasonable 1947 expectations of the other signatories to GATT be honored.

CONCLUSION

For the foregoing reasons, the decision under review should be affirmed.

Respectfully submitted,

SAUL L. SHERMAN
JOSEPH S. KAPLAN
RIVKIN SHERMAN AND LEVY
750 Third Avenue
New York, New York 10017
Attorneys for Amicus Curiae

April 1978